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IN THE

Supreme Court of the United States

JOE BOB MONCRIEF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner's sentence, imposed under the United States Sentencing Guidelines, is inconsistent with the Sixth Amendment to the United States Constitution as construed by this Court in *United States* v. *Booker*, 125 S. Ct. 738 (2005).

2. Whether the court of appeals erred in holding, in conflict with other circuits, that a defendant can never establish prejudice from an erroneous application of the Sentencing Guidelines—even where the error increased the sentencing range—unless the defendant's actual sentence exceeded the permissible maximum under a correct application of the Guidelines.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Joe Bob Moncrief was defendant-appellant in the court of appeals. The United States of America was plaintiff-appellee.

Petitioner, along with Kevin M. Mei, Frank Domenic Mei, Frank Mei, Sr., Daniel Mei, Phillip Darnell Durbin, Thomas Walter Polcyn, and Alvin Jeffrey Loupe, were co-defendants in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Joe Bob Moncrief respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the court of appeals, *United States* v. *Moncrief*, No. 02-21017 (5th Cir. Nov. 1, 2004) (avail. 2004 WL 2434841), is reproduced at App., *infra*, 1a-34a. The judgment of the United States District Court for the Southern District of Texas is reproduced at App., *infra*, 35a-41a. Excerpts of the transcript of the sentencing proceeding are reproduced at App., *infra*, 42a-49a.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2004. The petition for rehearing was denied

on December 29, 2004. App., *infra*, 50a-51a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions are set forth in the appendix to this petition. App., *infra*, 52a-66a.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner Joe Bob Moncrief was convicted of bank fraud, in violation of 18 U.S.C. § 1344; conducting monetary transactions with criminally derived property, in violation of 18 U.S.C. § 1957(a); money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i); and conspiracy, in violation of 18 U.S.C. §§ 371, 1956(h). He was sentenced to 210 months' imprisonment under the United States Sentencing Guidelines. On November 1, 2004, the United States Court of Appeals for the Fifth Circuit affirmed, rejecting petitioner's challenges to his sentence and to the constitutionality of the then-mandatory federal Sentencing Guidelines. Shortly after the court of appeals issued its judgment, this Court decided *United States* v. *Booker*, 125 S. Ct. 738 (2005).

1. Petitioner was, for much of his life, a real-estate appraiser and broker. App., *infra*, 6a. Along with others, he was charged with aiding a conspiracy conceived and run by the Mei family to commit bank fraud and money laundering through a number of companies. *Id.* at 1a-2a. Beginning in 1996, the Mei family began using fraudulent transactions to obtain mortgage loans on residential properties that exceeded the value of the properties. *Id.* at 3a. The other defendants in this case pleaded guilty to a reduced slate of charges and received sentences ranging from 2 to 8 years. *Id.* at 2a. Moncrief proceeded to trial on the full 21-count indictment.

a. The government's case consisted primarily of evidence relating to the Meis' involvement in the purchase of six houses. Those "[s]ix real estate transactions in which [petitioner] provided an appraisal provide[d] the basis for all counts alleged in the indictment." App., *infra*, 8a. The government contended that, through the use of Mei-controlled mortgage companies, straw purchasers, title-company employees, and altered documents, the Meis secured loans on those properties at inflated values, leaving the lenders in those transactions under-secured. *Id.* at 3a-4a.

The government introduced evidence showing that, beginning in 1997, petitioner performed appraisals for the Meis and earned a standard appraisal fee of $300 per house. App., *infra*, 7a-8a. Petitioner eventually began referring properties to the Meis for purchase as well. *Ibid.* Those properties would be accepted for purchase, he was told, only if the financials met a set formula specified by the Meis. *Id.* at 7a-8a. During the relevant period, petitioner received a finder's fee of $3,000 for each house he located for the Meis to purchase. *Id.* at 8a.[1]

The government also showed that petitioner purchased his own home through a Mei-controlled mortgage company. App., *infra*, 11a. A Mei-controlled affiliate signed a contract to pay $147,500 for the house, and petitioner in turn signed a contract to purchase it from the affiliate for $215,000. *Ibid.* Documents submitted to the lender by the mortgage company were falsified to overstate petitioner's liquid assets. *Id.* at 11a-12a. There is no dispute that petitioner made mortgage payments on the property. *Id.* at 12a. However, according to Frank Mei, the procedure allowed petitioner to purchase his house without making a down-payment. *Ibid.* Petitioner, in contrast, testified that

[1] Many other real-estate agents likewise received $3,000 finder's fees for locating houses for the Meis to purchase.

he was not aware of the Meis' machinations in connection with the sale, that the Meis had falsified and altered the relevant documents, and that petitioner actually made a down-payment of $7,500. *Ibid*; see Pet. C.A. Reply Br. 5.

Following the presentation of evidence, the jury returned a verdict of guilty for conspiracy, in violation of 18 U.S.C. §§ 371, 1956(h); bank fraud, in violation of 18 U.S.C. § 1344; money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i); and conducting monetary transactions with criminally derived property, in violation of 18 U.S.C. § 1957(a).

b. At sentencing, the district court applied the 2000 edition of the Sentencing Guidelines, even though petitioner was sentenced in 2001.[2] Under the 2000 Guidelines, the amount attributed to petitioner for the money laundering offense was determined without a reduction for the funds recovered, or for the actual value of any collateral securing the fraudulently obtained loans. PSR ¶ 25; see also U.S.S.G. § 2S1.1. Accordingly, despite evidence that each of the loans was collateralized by houses and that some of the loans had been paid back in part or in full—and notwithstanding the fact that petitioner received only $250,000 in appraisal and referral fees—petitioner was

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[2] As a general rule, district courts must use the Guidelines Manual in effect on the date that the defendant is sentenced, not the date on which the crime was committed. U.S.S.G. § 1B1.11(a) (2001). However, where doing so would *increase* the defendant's sentence compared to applying the Guidelines in effect when the crime was committed, the prohibition on *ex post facto* legislation requires courts to follow the Guidelines in effect on the date of the crime. See *ibid.* In this case, the Presentence Report cited *ex post facto* concerns to justify applying the year 2000 Guidelines rather than the 2001 Guidelines—even though petitioner's crime was committed in *1998*, and even though, as it turned out, the 2000 Guidelines produced a longer sentence than the 2001 Guidelines. See App., *infra*, 26a n.17.

sentenced based on the full $24 million in mortgages that the Meis had fraudulently obtained. The district court calculated petitioner's base offense level as 23, U.S.S.G. § 2S1.1(a)(1), to which the court added 10 levels based on the amount of money involved, U.S.S.G. § 2.S1.1(b)(2)(K). The court also imposed a two-level enhancement for use of a special skill, U.S.S.G. § 3B1.3, and a two-level enhancement for obstruction of justice, U.S.S.G. § 3C1.1, bringing petitioner's total offense level to 37. With a criminal history category of I, petitioner was subject to a sentencing range of 210-262 months. See App., *infra*, 44a.

The district court denied petitioner's motion for a downward departure. The district court agreed that the Guidelines produced a singularly harsh result, but it held that the mandatory nature of the Guidelines precluded relief:

> I have read the record of your life and you have much to be proud of, which makes this all the more heart-breaking. But given the record that is before me, given the constraints that the guidelines impose[], there is just no way that I can on [a] principle[d] basis, depart downward * * *.

App., *infra*, 47a. Accordingly, the court imposed the minimum term of imprisonment—210 months—permissible under the 2000 Guidelines.

2. On appeal, the Fifth Circuit affirmed. App., *infra*, 1a-34a. Reviewing the district court's application of the 2000 Guidelines (rather than the 2001 Guidelines) for plain error, the court of appeals agreed that "the district court's error" in applying the 2001 Guidelines was "clear and obvious." *Id.* at 26a. Nonetheless, the court of appeals affirmed on the theory that petitioner "cannot show prejudice." *Ibid.*

a. The court of appeals did not dispute that, because critical provisions of the Sentencing Guidelines were

"almost completely rewritten" between 2000 and 2001, there were significant differences between the way the 2000 and 2001 editions of the Sentencing Guidelines treated petitioner's base offense level and loss calculations. App., *infra*, 25a. Nor did the court dispute that the different editions produced *different sentencing ranges*. *Id.* at 26a, 32a-33a. Under the 2000 edition of the Sentencing Guidelines, the court noted, petitioner's sentencing range was 210 to 262 months. *Id.* at 26a, 32a. In contrast, the court concluded that application of the 2001 edition of the Guidelines "would produce a sentencing range of 188 to 235" months—almost two years less at both the top and bottom of the range. *Id.* at 26a, 33a.

The court of appeals, however, held that it was petitioner's burden to show that "he *necessarily* was prejudiced by the district court's mistaken application of the 2000 Guidelines rather than the 2001 Guidelines." App., *infra*, 32a (emphasis added). The court held that petitioner had not met that burden because the district court *could have* sentenced petitioner to 210 months' incarceration even under the 2001 Guidelines. *Id.* at 32a-33a. The court of appeals made no mention of the fact that a 210-month sentence would have been near the top of the permissible range under the 2001 Guidelines. It did not mention that the district judge had imposed the minimum prison term available under the 2000 Guidelines. And it did not mention that the district court had deemed petitioner's sentence harsh and labeled the unavailability of a more lenient sentence "heart-breaking." *Id.* at 47a.

b. In determining what it believed petitioner's sentencing range would have been under the 2001 Guidelines, the court of appeals resolved a number of factual and legal issues not previously considered by the district court. First, the court of appeals imposed a 20-level enhancement for the amount of loss, pursuant to Section 2B1.1(b)(1)(K) of the 2001 Guidelines. App., *infra*, 27a-28a. Under the 2000

Sentencing Guidelines applied by the district court, loss calculations for money laundering did not include reductions or credits for the value of collateral or amounts otherwise recovered. U.S.S.G. § 2S1.1 (2000) (no provision for such credits). In contrast, the 2001 Guidelines for money laundering of bank-fraud proceeds provided that, for that type of transaction, loss amounts are to be reduced by the amounts actually recovered or the "fair market value of the collateral at the time of sentencing." U.S.S.G § 2B1.1 cmt. n.2(E)(ii) (2001). App., *infra*, 27a-30a.

The court of appeals did not dispute that such deductions are mandatory. But it faulted petitioner for not having introduced in district court evidence of the value of the collateral at the time of sentencing (even though the district court's erroneous application of the 2000 edition of the Guidelines had made that evidence irrelevant to the sentencing calculation). App., *infra*, 27a-28a. Accordingly, citing the Guidelines' requirement that a district court's loss figure must be given "appropriate deference," the court of appeals declined to overturn the district court's estimate. Based on a fraud loss of $7.3 million, the court of appeals added 20 levels to the otherwise applicable base offense level of six. *Id.* at 29a.

In addition, the court of appeals added two levels each for use of sophisticated means, U.S.S.G. § 2B1.1(b)(8), and the involvement of more than 10 victims, U.S.S.G. § 2B1.1(b)(2)(A). App., *infra*, 29a. Neither of those was part of the district court's sentencing calculation under the 2000 Guidelines.[3] Based on those calculations, the court of appeals concluded that petitioner's offense level under the 2001 Guidelines would have been 36, one level lower than

[3] The court of appeals also applied two-level enhancements for obstruction of justice, U.S.S.G. § 3C1.1, and use of special skill, § 3B1.3. App., *infra*, 30a-32a. Both of those, however, had been imposed by the district court under the 2000 Guidelines as well.

the level 37 the district court calculated under the 2000 Guidelines. *Id.* at 32a-33a. As noted above, the sentencing range under the 2001 edition of the Guidelines thus differed from, but overlapped with, the range under the 2000 edition.

c. Finally, the court of appeals rejected petitioner's argument that his sentence violated the Sixth Amendment as construed by this Court in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). Petitioner's challenge to the Guidelines, the Fifth Circuit held, was foreclosed by that court's now-vacated decision in *United States* v. *Pineiro*, [illegible] F.3d 464 (5th Cir. 2004), which held "that *Blakely* does not apply to the Sentencing Guidelines." App., *infra*, 33a n.23. The court of appeals declined to pass on whether that issue had been timely raised. *Ibid.*[4]

3. On December 29, 2004, the court of appeals denied a petition for rehearing and rehearing en banc. App., *infra*, 50a-51a. Less than one month later, this Court issued its decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005), holding that *Blakely* does apply to the Sentencing Guidelines.

REASONS FOR GRANTING THE PETITION

After the court of appeals issued the decision below, this Court issued its decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005). *Booker* reaffirmed the Court's previous holdings in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), and *Blakely* v. *Washington*, 124 S. Ct. 2531, 2536 (2004), that any fact other than a prior conviction that increases the penalty for a crime beyond the otherwise applicable statutory maximum must be admitted by a defendant or proved to a jury beyond a reasonable doubt.

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[4] Petitioner had raised the *Blakely* argument in a notice of supplemental authority pursuant to Fed. R. App. P. 28(j) shortly after *Blakely* was decided. In addition, both parties submitted additional briefing on the issue at the court of appeals' request.

Booker expressly held that "the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines." *Booker*, 125 S. Ct. 738, 746 (2005).

In this case, a significant portion (at least 14 levels) of petitioner's offense level—and thus at least 12 years of his sentence—was based on facts neither admitted by petitioner nor submitted to a jury and proved beyond a reasonable doubt. As a result, petitioner's sentence is inconsistent with the Sixth Amendment as construed in *Booker*. The court of appeals, moreover, exacerbated the *Booker* error. When examining whether there was prejudice from the district court's mistaken application of the 2000 Guidelines, the court of appeals itself made factual findings to calculate a probable sentence under the 2001 Guidelines. The court did not, however, consider whether those facts were proved beyond a reasonable doubt. Nor did it give petitioner a meaningful opportunity to present evidence on the newly relevant issues.

Finally, when making the prejudice determination, the court of appeals applied a prejudice test that squarely conflicts with the standard applied by at least seven other circuits. Accordingly, this Court should vacate the opinion below and remand the case to the Fifth Circuit for reconsideration in light of *Booker*. Alternatively, the Court should grant the petition and set the case for plenary review on whether the court of appeals applied the proper standard of prejudice.

A. Petitioner's Sentence Is Inconsistent With This Court's Decision In *Booker*

In *United States* v. *Booker*, this Court held that a defendant's sentence violates the Sixth Amendment if "the jury's verdict alone [did] not authorize the sentence." *Booker*, 125 S. Ct. at 751. In *Booker* itself, the evidence before the jury showed that defendant Booker was caught with 92.5 ounces of crack cocaine in his duffle bag. As a

result, Booker was charged with (and the jury found Booker guilty of) possessing at least 50 grams of crack cocaine, in violation of 21 U.S.C. § 841 (b)(1)(A)(iii). *Booker*, 125 S. Ct. at 751. Based on the proof adduced at trial, Booker could have been sentenced to imprisonment for between 210 and 262 months. *Ibid.* The trial court, however, found by a preponderance of the evidence that Booker possessed an additional 566 grams of crack cocaine. Based on that increased quantity, the court sentenced Booker to 360 months' imprisonment under the Sentencing Guidelines. *Ibid.* Reversing, this Court held that imposing a longer sentence on Booker violated the Sixth Amendment because the applicable maximum had been increased based on judicial factfinding rather than on facts proved to the jury beyond a reasonable doubt. *Id.* at 751, 769.

1. Like the sentence invalidated in *Booker*, petitioner's sentence cannot be squared with the Sixth Amendment. The jury did find petitioner guilty of conspiracy, money laundering, bank fraud, and conducting monetary transactions with criminally derived property. App., *infra*, 13a. But it did not find beyond a reasonable doubt that the amount of loss resulting from those transactions was $24 million. (To the contrary, the government's case at trial centered around just six transactions, the value of which was a fraction of that sum.) Nonetheless, the district court increased petitioner's offense level by 10 levels because it found by a preponderance of the evidence that the loss was $24 million. See U.S.S.G. § 2S1.1(b)(2)(K). Petitioner's offense level was increased by two additional levels based on the district court's finding, also by a preponderance of the evidence, that petitioner used his special skill as an appraiser in furtherance of the offense. See U.S.S.G. § 3B1.3. Finally, petitioner's offense level was increased by another two levels based on the district court's conclusion that he had committed perjury. U.S.S.G. § 3C1.1.

The resulting 14-point increase in petitioner's offense level—all based on the trial court's factual findings by a preponderance of the evidence—quadrupled the lawful sentencing range from 46-57 months to 210-262 months. That dramatic change in the lawful sentence cannot be squared with the Sixth Amendment right "to have the jury find the existence of 'any particular fact'" that "the law makes essential to [the defendant's] punishment." *Booker*, 125 S. Ct. at 746 (quoting *Blakely*, 124 S. Ct. at 2536).

2. The court of appeals' analysis of the prejudice flowing from the erroneous application of the 2000 edition of the Guidelines suffers from the same defect. In evaluating what it thought petitioner's sentence under the 2001 Guidelines might have been, the court of appeals applied the same statutory regime this Court invalidated in *Booker*. The court of appeals did not calculate the sentencing range under the 2001 Guidelines based solely on facts found beyond a reasonable doubt by the jury or admitted by petitioner. Nor did it analyze whether the "facts" it relied on would have been found beyond a reasonable doubt by a jury based on the evidence at trial. Instead, it relied on the information gleaned from the presentence report, presumably under a preponderance standard. Indeed, relying on the 2001 Guidelines, the court of appeals increased petitioner's offense level *28 levels* in reliance on facts never found by the jury. App., *infra*, 32a n.22.

The court of appeals' analysis, moreover, illustrates precisely the dangers the Sixth Amendment and this Court's *Booker* decision are designed to avoid. For example, the court of appeals determined that, "[u]nder section 2B1.1(b)(2)(A), two more points must be added" to petitioner's offense level "because the PSR clearly shows the involvement of more than ten victims." App., *infra*, 29a. That speculative enhancement, however, was not merely based on facts never found by a jury beyond a reasonable doubt. It was based on facts never determined by the *trial*

court and which petitioner has had no opportunity to dispute under any legal standard.

It is quite likely that there were far fewer than 10 victims (and correspondingly likely that the government could not meet its burden of proving more than 10 victims). The application notes to the Sentencing Guidelines define "victim" as "any person who sustained any part of the *actual* loss determined under section (b)(1)." U.S.S.G. § 2B1.1 cmt. n.3(A)(ii) (2001) (emphasis added). Here, the indictment identified only *four* lenders. Although a chart appended to the presentence report listed 39 lenders, there is no evidence in the presentence report or the record below that those lenders actually suffered losses so as to meet the definition of a "victim." Because the vast majority of those lenders had only one or two loans, many of the loans were repaid in full, and many properties increased in value (eliminating the under-collateralization), it is likely that many lenders suffered no loss and thus were not "victims" at all.

The court of appeals, moreover, faulted petitioner for failing to introduce evidence that the district court refused to hear. A major difference between the 2000 and 2001 Guidelines is their treatment of money laundering under Guidelines Section 2S1.1. Under the 2000 Guidelines applied by the district court, money laundering carries a base offense level of 23, with points added depending on the quantity of funds laundered. U.S.S.G. § 2S1.1(a)(1). In contrast, Section 2S1.1(a) of the 2001 Guidelines directs the court to determine the offense level by reference to the underlying offense that generated the laundered funds—here, the Meis' bank fraud. That calculation begins with an offense level of 6, with points added depending on the amount of loss. U.S.S.G § 2B1.1.

Critically, the 2000 and 2001 Guidelines prescribe different methodologies for calculating the amount of loss added to the base offense levels. Under the 2000 Guide-

lines, the defendant is held liable for the sums laundered—here, the entire $24 million in mortgages obtained by the Meis. U.S.S.G. § 2S1.1(b). In the district court, that figure resulted in a 10-level increase. U.S.S.G. § 2S1.1(b)(2)(K). Under the 2001 Guidelines, the loss calculation is based on the underlying offense (such as bank fraud); and Section 2B1.1 provides that, "in a case involving collateral pledged," the amount of loss is reduced by any amounts "the victim has recovered at the time of sentencing" and by "the fair market value of the [remaining] collateral at the time of sentencing." U.S.S.G. § 2B1.1 cmt. n.2(E)(ii). Thus, in this case, the amount of loss under the 2001 Guidelines should have been reduced substantially in light of the sums repaid on the allegedly fraudulent loans and by the fair market value, at the time of sentencing, of the houses securing any remaining mortgages.

In making that calculation on appeal, the Fifth Circuit relied on the presentence report's statement that the "fraud loss" was $7,385,740. But the presentence report's calculation was based on "the difference between the fraudulent loan ($24,330,339) and the *original* purchase price of the property *when it first came into the scheme* ($16,944,599) * * *." PSR ¶ 25 (emphasis added). Petitioner argued to the court of appeals that the presentence report's calculation failed to follow the 2001 Guidelines' instruction to give credit both for money actually repaid on the loans and for the value of the collateral *at the time of sentencing*. The court of appeals acknowledged that error, but faulted petitioner for the lack of "evidence in the record to show that the loss would amount to less than $7 million if the value of the collateral had been established at the time of sentencing rather than the time the crimes were committed." App., *infra*, 29a.

The reason the record lacked such evidence, however, is that establishing the precise value of the collateral was *irrelevant to the loss calculation under the 2000 Guidelines*

applied by the district court. In his objections to the presentence report and again at the sentencing hearing, petitioner argued that the district court should calculate the loss amount under the fraud provisions and thus provide such credits against the losses. The district court summarily rejected that argument because it determined that—under a "straightforward application of the [2000] guideline grouping"—the amount of loss was the entire $24,330,339 of mortgage loans secured by the Meis. App., *infra*, 43a. Thus, the courts did not merely relieve the government of its burden of proving the amount of loss. They denied petitioner any meaningful opportunity to develop a record showing that the proper loss under Section 2B1.1 was less than the $7,385,740 suggested by the presentence report. Even a modest reduction in that amount would have proved significant to petitioner, because a loss amount of less than $7,000,000 would have yielded a two-level reduction in petitioner's offense level and reduced the minimum prison term by 42 months. U.S.S.G. § 2B1.1(b)(1)(J) & (K).

Booker, properly applied, precludes that sort of slipshod analysis. It prohibits district courts from sentencing a defendant in excess of the otherwise applicable maximum based on factual findings made by the judge by a preponderance of the evidence, rather than proof beyond a reasonable doubt to the satisfaction of the jury. *A fortiori* it forecloses the courts of appeals from, in effect, increasing a defendant's sentence to four times the otherwise applicable maximum based on appellate factfinding without an adequately developed record under a faulty preponderance standard.

B. This Court Should Grant The Petition, Vacate The Court Of Appeals' Judgment, And Remand The Case For Further Consideration In Light Of *Booker*

When an intervening decision of this Court changes a question of federal law upon which a lower court decision is predicated, this Court customarily grants the petition, vacates the judgment below, and remands to the lower court (GVR). *Sarr* v. *Wyoming*, 125 S. Ct. 297 (2004); *Robinson* v. *Story*, 469 U.S. 1081 (1984); *Lawrence* v. *Chater*, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting) ("By 1945, we could state that it was '[a] customary procedure' for the Court 'to vacate the judgment of [a] state court where there has been a supervening event since its rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances.'") (quoting *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U.S. 154, 161 (1945)).

The same course is warranted here. The decision below rests on the premise, now rejected by this Court, that the Court's construction of the Sixth Amendment in *Blakely* did not render the Sentencing Guidelines unconstitutional. In rebuffing petitioner's constitutional challenge to the Guidelines, the decision below adhered to "*United States* v. *Pineiro*, 377 F.3d 464 (5th Cir. 2004)," which "ruled that *Blakely* does not apply to the Federal Sentencing Guidelines." App., *infra*, 33a n.23; see also *ibid.* ("*Blakely* * * * is inapplicable to the instant case"). In *Booker*, however, this Court reached the opposite conclusion, holding that "the Sixth Amendment as construed in *Blakely does apply* to the Sentencing Guidelines." 125 S. Ct. at 746 (emphasis added); see *id.* at 739 ("There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines * * * ."). Indeed, *Booker* holds that

"the Court's remedial interpretation of the Sentencing Act must be applied to all cases on direct review," 125 S. Ct. at 745 (internal citation omitted). Consistent with that, this Court has since vacated the *Pineiro* decision upon which the decision below relied, remanding it for reconsideration in light of *Booker*. 125 S. Ct. 1003 (2005) (No. 04-5263). The Court should do likewise here.[5]

Indeed, the prejudice resulting from the district court's and court of appeals' application of the Guidelines is palpable. The Guidelines did not merely authorize the district court to increase petitioner's sentence beyond the otherwise applicable statutory maximum. It compelled the district court to impose a sentence that court found "heart-breaking" but unavoidable given "the constraints that the guidelines imposed." App., *infra*, 47a. Now that the Guidelines under *Booker* are just that—advisory guidelines rather than binding restraints—the district court should have the opportunity to reconsider the "heartbreaking" 17-year sentence imposed on petitioner.

C. The Standard Of Prejudice Applied By The Fifth Circuit Conflicts With The Standard Applied By Other Courts Of Appeals

Even aside from the effect of this Court's decision in *Booker*, the Fifth Circuit's decision warrants further review

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[5] The Fifth Circuit declined to reach whether petitioner, by raising *Blakely* in a notice of supplemental authority pursuant to Fed. R. App. P. 28(j) shortly after *Blakely* was decided, had timely raised the issue. App., *infra*, 33a n.23. That question, accordingly, is one for the Fifth Circuit on remand. In any event, under Fifth Circuit precedent, the court of appeals may properly address the issue. See, *e.g.*, *United States* v. *Gonzalez*, 259 F.3d 355, 359 (5th Cir. 2001) (addressing unbriefed *Apprendi* error on direct appeal sua sponte because "plain error is apparent"); *DSC Communications Corp.* v. *Next Level Communications*, 107 F.3d 322, 326 n.2 (5th Cir. 1997) (considering new issue raised in supplemental briefing addressing intervening change in the law).

because it conflicts with the decisions of other courts of appeals on the proper standard for "prejudice" when determining whether there is "plain error" under Federal Rule of Criminal Procedure 52.

The court of appeals agreed that the district court had committed an unmistakable and thus plain or obvious error by applying the 2000 edition of the Sentencing Guidelines. App., *infra*, 26a. And it agreed that applying the proper, 2001 edition of the Guidelines would have reduced petitioner's offense level and thus the sentencing range. *Id.* at 26a, 32a-33a. Nonetheless, the court held that petitioner did not suffer prejudice because the sentencing range under the 2001 Guidelines (188 to 235 months) encompassed the 210-month sentence petitioner actually received. The court of appeals ignored the fact that the district court had given petitioner the lowest possible sentence under the Guidelines edition it applied; the court of appeals also ignored the fact that the district court had deemed petitioner's sentence "heart-breaking." Instead, following Fifth Circuit precedent, the court of appeals held that, because petitioner *could* have received a 210-month sentence under the 2001 Guidelines, he could not show that he "necessarily" received a higher sentence by virtue of the district court's erroneous application of the 2000 Guidelines. *Id.* at 32a-33a (citing *United States* v. *Leonard*, 157 F.3d 343, 346 (5th Cir. 1998)).

That standard of prejudice—under which the defendant must prove not only that his sentence likely would have been different, but also that the law *mandated* a different sentence—has been rejected by at least seven other courts of appeals. See *United States* v. *Plaza-Garcia*, 914 F.2d 345, 347-348 (1st Cir. 1990); *United States* v. *Martinez-Rios*, 143 F.3d 662, 676 (2d Cir. 1998); *United States* v. *Knight*, 266 F.3d 203, 210 (3d Cir. 2001) (expressly rejecting the Fifth Circuit's decision in *Leonard*); *United States* v. *Ford*, 88 F.3d 1350, 1356 (4th Cir. 1996); *United States* v. *Wallace*, 32 F.3d 1171, 1174 (7th Cir. 1994); *United States* v.

Weaver, 161 F.3d 528, 530 (8th Cir. 1998); *United States* v. *Osuna*, 189 F.3d 1289, 1295 (10th Cir. 1999); see also *United States* v. *Lavoie*, 19 F.3d 1102, 1104 (6th Cir. 1994) (court of appeals has jurisdiction to review Guidelines error "even though the sentence imposed is within the guideline range proposed by the defendant"). Those courts hold that "an after-the-fact determination that the sentence actually imposed happened to be within the proper range does not cure the [district court's] error" in its application of the Guidelines. *Knight*, 266 F.3d at 209 (quoting *Lavoie*, 19 F.3d at 1102); *Osuna*, 189 F.3d at 1295 (the "fact that the guidelines ranges overlap does not make a plain error harmless"). The defendant, they hold, has a right "to a sentence that not only falls within a legally permissible range, but that was imposed pursuant to correctly applied law." *Knight*, 266 F.3d at 210.

The majority approach is unquestionably correct. It defies common sense to presume—as the Fifth Circuit does—that lowering the Guidelines range would not benefit a defendant simply because the court, exercising its discretion, could choose the same sentence again. "[S]uch speculation 'is inappropriate' in light of the inherently discretionary nature of the sentencing court's decision." *Knight*, 266 F.3d at 208 (quoting *United States* v. *Pollen*, 978 F.2d 78, 90 (3d Cir. 1992)). Such speculation is particularly inappropriate where, as here, the district court thought it was imposing the lowest sentence the Guidelines would allow but a correct application of the Guidelines would have authorized an even lower sentence. And the Fifth Circuit's presumption of no prejudice simply blinks reality where, as here, the district court expresses dismay about the harshness of the sentence and describes the result as "heart-breaking."

The significance of this issue is not substantially diminished by this Court's decision in *Booker*, which made the Guidelines advisory rather than mandatory. That decision

"requires judges to take account of the Guidelines together with other sentencing goals," 125 S. Ct. at 744, and some courts have interpreted that admonition to mean that, "[i]n all but the most unusual cases, the appropriate sentence will be the Guidelines sentence," *United States* v. *Wilson*, 350 F. Supp. 2d 910, 914 (D. Utah 2005) (Cassell, J.). In short, because the Guidelines continue to exert significant influence on sentencing decisions, the proper standards of prejudice (and harmlessness) from their misapplication remain an important and recurring issue that divides the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the Fifth Circuit for further consideration in light of this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005). Alternatively, the Court should grant the petition to review the Fifth Circuit's prejudice standard.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-21017

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

VERSUS

JOE BOB MONCRIEF,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Southern District of Texas
No. H-00-544

Before BARKSDALE and PICKERING, Circuit Judges, and LYNN,* District Judge.

PER CURIAM:**

This appeal of the conviction of the appellant Joe Bob Moncrief involves what the government claims is the largest mortgage-loan-fraud operation ever to be prosecuted. No fewer than twenty-three individuals have been prosecuted in connection with this scheme. The indictment

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* District Judge of the Northern District of Texas, sitting by designation.

** Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

at issue here was brought against seven named defendants in addition to Moncrief. The indictment charged all eight defendants with violations of federal law in twenty-one counts. By May 2001, the seven other indicted defendants had pleaded guilty to at least one of the charged offenses. Moncrief, however, denied guilt and proceeded to trial.

The trial was conducted from August 15 to August 29, 2001. Twenty-six witnesses presented testimony, including several members of the conspiracy, a government investigator, realtors, and loan agents. Moncrief testified in his own defense. Trial testimony described a broad conspiracy centering on four members of the Mei family: Kevin Mei, Frank Mei, Jr., Daniel Mei, and Frank Mei, Sr.

I. *Background*

A. *Mei Enterprises and the Straw Buyer Bank Fraud Scam*

The Meis were the owners of Mei Enterprises, a conglomeration of several businesses operated by members of the Mei family. Mei Enterprises included a construction company operated by Frank Mei, Sr. In addition, Kevin and Frank Mei, Jr., operated several real estate companies. These companies included Hathaway Properties, Inc., Ashridge Enterprises, Inc., Bernard Management Corporation, Inc., Culburn Investments, and others. The companies had separate bank accounts and were operated by either Kevin, Daniel, or Frank Mei, Jr., although the corporate office served by each sibling differed from one company to another. Mei Enterprises also included Phillip Durbin, Jeff Mangold, Daniel Mei, Maura Slagel, and James Long, who were mortgage brokers operating under the names Foresight Mortgage, Innovative Residential Funding, Advanced Residential Funding, Flynn Mortgage and others. Mei Enterprises operated out of a common office.

In 1996, Kevin and Frank Mei, Jr., began the bank fraud scheme that evolved into the subject of the instant indictment. The object of the scheme was to accumulate large amounts of cash by inducing mortgage lenders to provide the Meis with loans that were $50,000 to $80,000 in excess of what it cost the Meis to purchase the real estate that served as the collateral for the loan. To obtain those inflated loans, the Meis orchestrated sham real estate transactions in which the Meis would appear to sell a particular property, which coincided with actual sales in which the Meis would purchase, for the first time, the very same property.[1] The Meis would dupe the lender into believing that the loan was for the sham transaction with its inflated price, when in reality the Meis used the loan to purchase the property at a much lower price in a separate transaction. The Meis used the loan proceeds to pay for the entire real estate purchase and all closing costs associated with the sale. Then they simply kept the $30,000 to $50,000 in loan proceeds that were left over after the purchase was completed and expenses paid. In this way, the Meis accumulated large sums of money.

The scheme worked as follows: The Meis would locate a property for sale, either by themselves or through a referral from a "locator" to whom the Meis would pay a finder's fee when the transaction was completed. Once a suitable property was identified, the Meis, acting through one of their realty companies such as Hathaway Properties, would contract to purchase the property from its owner. The Meis then would identify someone to serve as the straw buyer for a parallel sham transaction that would be used to obtain an inflated loan. In many of the Meis' transactions, family members such as Frank, Sr., served as the straw buyer. Later, as the Meis exhausted the creditworthiness

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[1] At trial, witnesses referred to these as "flip transactions."

of their original group of straw buyers, additional straw buyers had to be recruited.

The contract for the sham transaction—that is, the one between one of the Mei realty companies and the straw buyer—would list a purchase price tens of thousands of dollars greater than the purchase price between the Mei realty company and the original seller.[2] The Meis, acting through one of their mortgage companies such as Foresight Mortgage, would apply for a mortgage loan ostensibly to fund the straw buyer's purchase of the property from the Mei realty company. Because the purchase price of the sham transaction was inflated by several thousand dollars, the amount of the loan always exceeded the purchase price of the real transaction between the original seller and the Mei realty company.

To secure a loan of the desired size, the Meis had to deceive the lender as to several matters. First, the lender had to believe that the Mei realty company already owned the home before they actually did. Thus, the Meis needed a counterfeit commitment of title, and they had to prevent the lender from learning of the transaction through which the Meis actually would acquire the property, which would occur only after the loan was disbursed. Second, the lender had to believe that the purchase price in the sham transaction was consistent with a reasonable market price. This required an appraisal that valued the realty at a much higher price than what the Meis would spend to purchase the property. Third, the Meis had to falsify the straw buyer's financial information to make the straw buyer appear more credit-worthy than he or she actually was.

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[2] At trial, the Meis referred to the sham transaction as the "loan side" of the transaction. The transaction between the original seller and the Mei realty company was referred to as the "cash side" of the transaction. Because these terms are unilluminating as to the nature of what they describe, we avoid their use here.

Fourth, the Meis had to ensure that no red flags were raised that would provoke the slightest additional inquiry from the lender. At the time the Meis were applying for the loan, the true sale price of the property often was a matter of public record. Consequently, any investigation by the lender easily could prevent the loan from being approved.

The Meis' mortgage brokers at Foresight Mortgage or the other affiliated companies were responsible for preparing the fraudulent loan packages. The loan packages consisted of the loan application form, the straw buyer's employment verification, pay stubs, W-2s, tax returns, bank statements, the sham purchase contract, a uniform residential appraisal report form a licensed appraiser, and the counterfeit title commitment showing that the putative seller—the Mei realty company—had unencumbered title.

Once the loan was approved, the Meis arranged to close both sales—the real sale and the sham sale—on the same day. On closing day, the lender wired the loan amount to an escrow officer at the Meis' designated title company. The Meis often used the American Title Company where James Nguyen and Thomas Q. Nguyen,[3] who were allegedly members of the conspiracy, served as escrow officers. However, the Meis sometimes used other title companies where other escrow officers who allegedly were also members of the conspiracy were employed. When the loan proceeds were received by the title company, the escrow officers affiliated with the Meis immediately released the proceeds into a designated Mei bank account. Due to a special arrangement called force-pay debit that the Meis had with the bank, the Meis were able to access the loan proceeds immediately upon deposit. Using the loan

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[3] The record indicates that at the time of this appeal, the prosecution of Thomas Q. Nguyen and James Q. Nguyen, who the United States also alleges were participants in the conspiracy at issue here, was still pending, under a separate indictment.

proceeds, the Meis purchased two cashier's checks: One of the cashier's checks was payable in the amount of the straw buyer's down payment. The straw buyer was named as the payer of the check, and the title company was named as the payee. The second cashier's check was payable in the amount of the purchase price of the sale contract between the original seller and the Mei realty company. The check named the Mei realty company as the payer and the original seller as the payee. The checks were delivered to the title company, and with their payment, both transactions were complete. The original seller received his or her contract price, and the check for the down payment was placed in the title company's records to perpetuate the appearance that the straw buyer paid money down on the transaction. Eventually, however, the down payment was disbursed back to the Meis, who recorded the money as "profit" from the transaction.

The Meis paid the straw buyers $5,000 per transaction. If a realtor referred the property to the Meis, the Meis paid the realtor a $3,000 finder's fee. They paid the appraiser $300 for the appraisal. Some amount also was paid to the title and mortgage company. The Meis kept whatever money remained from the transaction. To offset the costs, the Meis rehabilitated the houses and rented them to tenants. The Meis made all the mortgage payments in the straw buyer's name.

B. *Moncrief Becomes Involved with the Meis*

Moncrief has held a realtor's license since 1980 and a real estate appraiser's license since 1992. He is also a licensed mortgage broker. He has worked in the past as both a realtor and an appraiser, although by 1997 he had stopped practicing as a realtor and instead was a full time residential appraiser.

Moncrief's first contact with the Meis occurred in December 1997 when he received two unsolicited faxes from

Foresight Mortgage. At this point, before Moncrief had any involvement with the Meis, the Meis already had performed at least twenty-four straw buyer transactions that provided nearly $5.5 million in loan proceeds. The faxes that Moncrief received in December 1997 were generic solicitations to perform preliminary appraisals on selected properties. Moncrief responded to the faxes and began conducting appraisals for Foresight. Eventually, Moncrief learned that the properties that he was appraising for the Meis were being referred to the Meis by other realtors. In order to expand his business with the Meis, Moncrief began referring properties to the Meis as well as performing appraisals. However, the Meis rejected all but one of the properties that Moncrief referred. Sometime around June 1998,[4] frustrated at receiving so many rejections, Moncrief asked Kevin Mei what the Meis' criteria for selecting property were. Frank Mei testified to this exchange as follows:

> And, you know, on the ones that we did, we'd say, "Okay. Go ahead and do the appraisal on it." So, Joe would actually do the appraisal. And then Joe kind of figured out, "Well, you know, I could find these too. I should be making the money these other people are making as well."
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> . . . .
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> He came in and said, "Well, there's got to be a method to your madness. There's got to be a reason why you're coming up with which properties you purchase and which properties you don't." And then we explained to him that method was a formula.

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[4] The date of this exchange was not established with any specificity. Moncrief testified that it occurred late in the Summer of 1998. Agent Kepler testified that Moncrief received his first finder's fee on June 6, 1998, suggesting it may have occurred earlier.

This was the formula: (house value x 80%) x .92) - list price • $35,000. The 80% in the formula represented the standard amount that lenders would lend on a residential real estate purchase—that is, lenders generally would lend up to 80% of the cost of a home. Thus, for a property to meet the formula's criteria, it had to be the case that 92% of the amount that a lender would lend someone to purchase the house was at least $35,000 more than the property's current list price. Later on, the Meis increased the formula value from $35,000 to $50,000.

From the day that the Meis told Moncrief their formula, every property that Moncrief referred to the Meis *worked* under their formula. From June 1998 until January 2000, Moncrief prepared at least eighty appraisals that the Meis used in straw buyer transactions. Frank Mei estimated that Moncrief performed approximately 100 appraisals for the Meis on straw buyer transactions. Moncrief was involved in more straw buyer transactions than any other appraiser that the Meis used.

The Meis paid Moncrief $300 for every appraisal he conducted. He received a $3,000 finder's fee for all properties where he made the initial referral to the Meis. Altogether, between June 6, 1998 and January 21, 2000, the Meis paid Moncrief at least $174,470 in finder's fees. Moncrief's frequent business with the Meis caused him to visit the Meis' office three or four times a week.

Six real estate transactions in which Moncrief provided an appraisal provide the basis for all the counts alleged in the indictment against Moncrief. To avoid repetition, we briefly summarize two such transactions.

C. *Transactions Described in the Indictment*

1. *1718 Park Ridge Drive*

On May 19, 1999, the Meis, acting through Ashridge Enterprises, closed sham and real transactions relating to the property located at 1718 Park Ridge Drive. In the real

transaction, Ashridge Enterprises, by Daniel Mei, purchased 1718 Park Ridge Drive from its true owner for a purchase price of $142,000. The property at 1718 Park Ridge was sold through Joseph B. Rothchild, a real estate broker. On February 12, 1999, Rothchild listed the property on the Multiple Listing Service[5] ("MLS") at a sales price of $144,900.

On March 18, 1999, the Meis executed a commitment of title fraudulently indicating that Ashridge Properties held title to 1718 Park Ridge Drive. On March 22, 1999, Daniel Mei signed the purchase contract with the property's true owner to purchase the property for $142,000. On March 31, 1999, Moncrief executed an appraisal report valuing 1718 Park Ridge Drive at $290,000. Although Moncrief verified in the appraisal report that he conducted an MLS and tax record inspection, he did not list the MLS value of the house. Moncrief did not disclose that a realtor was involved in the sale. He falsely indicated that at the time of the appraisal, Ashridge Enterprises was the owner of the property. He did not disclose that he would receive a $3,000 finder's fee if the transaction closed.

On May 18, 1999, the Bank of Yorba Linda deposited the approved loan amount of $234,935.64 into American Title Company's escrow account. On May 19, 1999, James Nguyen disbursed the loan proceeds into Ashridge Enterprises' bank account. By force-pay debit, the Meis used the loan proceeds to purchase two cashier's checks: one in the amount of $60,198 in the name of John Garcia, the Meis' straw buyer, to pay the down payment in the sham transaction, and one in the amount of $141,369.75 in the

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[5] The Multiple Listing Service is a database of the published asking prices for listed properties. It discloses the existence of pending contracts and provides tax valuations. Trial testimony indicated that realtors regularly rely on the MLS in determining the value of real estate.

name of Ashridge Enterprises to purchase 1718 Park Ridge Drive from its true owner.

This transaction formed the basis of count two of the indictment. Count two was for bank fraud. As charged in the indictment, the jury found that Moncrief committed bank fraud by submitting the appraisal report to Foresight Mortgage to be included in the loan application to the Bank of Yorba Linda.

2. *7950 Hertsfordshire Drive*

On June 3, 1999, the Meis, acting through the Bernard Management Corporation, closed real and sham transactions relating to property located at 7950 Hertsfordshire Drive. In the real transaction, the Bernard Management Corporation purchased 7950 Hertsfordshire Drive from its true owner for a purchase price of $219,263.20. In the sham transaction, the Bernard Management Corporation sold 7950 Hertsfordshire Drive to John Garcia for a purchase price of $350,000. As part of the loan package submitted in relation to John Garcia's purchase of the property, Moncrief provided an appraisal in which he valued the property at $350,000. The MLS listed 7950 Hertsfordshire Drive as having a purchase price of $220,000. In the appraisal, Moncrief also incorrectly reported that the Bernard Management Corporation held title to 7950 Hertsfordshire Drive. Moncrief also did not disclose that he would receive a $3,000 finder's fee if the transaction closed.

On June 13, 1999, First Franklin Financial deposited $333,447.20 by wire-transfer into the escrow account at the American Title Company. Nguyen, the escrow officer, immediately disbursed the proceeds into Bernard Management Corporation's account. On the same day, by force-pay debit, the Meis used the loan proceeds to purchase two cashier's checks: one in the name of John Garcia in the amount of $68,797.89 to serve as a down payment in the sham sale, and one in the name of the Bernard

Management Corporation in the amount of $219,263.20 to purchase 7950 Hertsfordshire Drive from its true owner. The Meis paid Moncrief a finder's fee on this transaction.

This transaction formed the basis of counts ten, nineteen, and twenty of the indictment. Count ten was for illegal money transaction and counts nineteen and twenty were for money laundering. As charged in the indictment, the jury found that the money laundering occurred when the Meis used the loan proceeds to purchase the cashier's checks.

D. ***Moncrief's Purchase of 8402 Braesdale***

In 1999, when Moncrief wanted to purchase a home, he made the purchase through the Meis' scheme. Moncrief selected the property he wanted to purchase, 8402 Braesdale, which was being sold by Camel Lee Girgis, and he asked the Meis to help arrange the purchase. On February 13, 1999, Hathaway Properties signed a contract with Girgis to purchase 8402 Braesdale for $147,500. Although Moncrief knew that Girgis was selling the property for $147,500, Moncrief signed a contract to purchase the property from Hathaway for $215,000. Moncrief applied for a mortgage loan from EquiCredit to fund the purchase. In the loan application, Moncrief's cash assets were falsified to represent that he had $75,200 in his checking account when he actually only had $698.94. EquiCredit approved a loan to Moncrief in the amount of $149,261.

On June 18, 1999, EquiCredit deposited the loan proceeds with the American Title Company. On that date. James Nguyen disbursed the loan proceeds to Hathaway's bank account. By force pay debit, the Meis used the loan proceeds to purchase a check in the amount of $149,041.56 to purchase 8402 Braesdale from Girgis. The Meis purchased a second money order in the name of Moncrief in the

amount of $58,007.31[6] to create the appearance that he paid a down payment in his purchase of the property in the sham transaction. Moncrief was present at the closing of the sale and signed all forms necessary to complete the purchase.

Although Moncrief, not Hathaway, made the mortgage payments on this property, Frank Mei noted that by using the straw buyer set up, Moncrief obtained his house without making a down payment. Moncrief testified that he was unaware of the Meis' machinations with regard to the sale, that he did not read the closing documents, and was unaware of anything out of the ordinary about the forms he signed. He also claims that the Meis altered his financial information, to his benefit, without his permission or consent.

E. *The Investigation*

In 1997, Michael Kepler, a Senior Agent with the Department of Housing and Urban Development ("HUD"), received tips that led him to investigate Mei Enterprises for irregularities in real estate transactions. In December 1998, the FBI executed a search warrant on the central office of Mei Enterprises in Houston. In February 1999, Special Agent Kepler questioned Moncrief about the appraisals he conducted for the Meis in the prior year. Kepler asked Moncrief about his methodology. Moncrief answered that he appraised the properties with reference to the MLS, tax records, and sales of comparable properties.

All of the transactions that are the subject of the indictment occurred after the FBI conducted a search of the Mei Enterprises offices and after Kepler conducted the interview with Moncrief on February 18, 1999. After February 18, 1999, Moncrief collected at least thirty-six additional finder's fees on straw buyer transaction with the Meis.

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[6] The record does not reflect where this $58,007.31 came from as the loan was for only $149,261.00.

F. *Moncrief's Conviction and Sentence*

On August 29, 2001, a jury convicted Moncrief of conspiracy in violation of 18 U.S.C. §§ 371 & 1956(h), of two counts of bank fraud in violation of 18 U.S.C. § 1344, of five counts of illegal money transactions in violation of 18 U.S.C. § 1957(a), and of nine counts of money laundering in violation of 18 U.S.C. § 1956(a)(1). On August 23, 2002, the district court imposed a 210-month sentence. Moncrief now appeals.

II. *Moncrief's Challenges to the Conviction*

A. *Sufficiency of the Evidence as to Conspiracy Charge*

The first issue this court will address is Moncrief's challenge to the sufficiency of the evidence. Moncrief failed to properly preserve his right to review on this question. Although Moncrief moved for acquittal at the conclusion of the government's case, the parties agree that he failed to move for acquittal at the close of evidence, nor did he move for acquittal after the entry of the verdict within the time required under Federal Rule of Criminal Procedure 29(c)(1), which requires that post-verdict motions for acquittal be filed within seven days of the verdict.[7] *See* Fed. R. Crim. P. 29(c)(1). Moncrief's failure to make a follow-up motion resulted in a waiver of his initial motion. Based on Moncrief's failure to make a follow-up motion, Moncrief's appellate challenge of the sufficiency of the evidence supporting his conviction should be reviewed only to prevent a miscarriage of justice.[8] *See United States* v.

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[7] On January 7, 2002, some four months after the entry of the verdict, Moncrief filed a letter with the court in which he asked the court to overturn the jury verdict. Citing *United States* v. *Emuegbunam*, 268 F.3d 377, 397 (6th Cir. 2001), Moncrief concedes that a court may not rule on an untimely motion for acquittal.

[8] Under a miscarriage of justice standard of review, the conviction can be reversed only if "the record is devoid of evidence pointing to

Delgado, 256 F.3d 264, 274 (5th Cir. 2001); *United States* v. *Pariente*, 558 F.2d 1186, 1187 n.1 (5th Cir. 1977).

However, Moncrief argues that his counsel's failure to move for acquittal constituted ineffective assistance of counsel. Citing *United States* v. *Rosalez-Orozco*, 8 F.3d 198, 199 (5th Cir. 1993), Moncrief argues that the court must evaluate the sufficiency of the evidence under the ordinary standard of review to determine whether that evaluation produces an outcome different than under a miscarriage of justice standard.[9] Moncrief's ineffective assistance claim requires this court to determine (1) whether defense counsel's performance was objectively unreasonable and (2) whether the defendant has shown a reasonable probability that the result of the proceedings would have been different absent the attorney's errors. *See Strickland* v. *Washington*, 466 U.S. 668, 687 (1984); *Rosalez-Orozco*, 8 F.3d at 199. Without analyzing whether the performance of Moncrief's counsel was objectively unreasonable, we conclude that Moncrief has failed to show prejudice because his conviction would be upheld under even the more lenient standard of review reserved for preserved challenges.

Under the ordinary standard of review that this court applies to preserved challenges to jury verdicts, the court must view "the evidence, any inferences to be drawn from

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guilt or contains evidence on a key element of the offense [that is] so tenuous that a conviction would be shocking." *United States* v. *Burton*, 324 F.3d 768, 770 (5th Cir. 2003).

[9] Although claims of ineffective assistance are rare on direct appeal, such claims are reviewable if "the record is sufficiently developed." *United States* v. *Freeze*, 707 F.2d 132, 138 (5th Cir. 1983). Moncrief argues that the record is fully developed for the court to evaluate this claim. He also notes that in the past the Fifth Circuit has found it appropriate to review on direct appeal ineffective assistance claims based on the failure to move for acquittal. *See Rosalez-Orozco*, 8 F.3d at 199.

the evidence, and any required credibility determinations in a light most favorable to the guilty verdict. The jury's verdict must be affirmed if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *United States* v. *Glasser*, 315 U.S. 60, 80 (1942). We conclude that the evidence amply supports affirmance under this standard.

To convict for conspiracy, the government must prove (1) an agreement between the defendant and a conspirator to violate a law of the United States; (2) an overt act by one conspirator in furtherance of the conspiracy; and (3) the specific intent to further an unlawful objective of the conspiracy. *See United States* v. *Bieganowksi*, 313 F.3d 264, 276-77 (5th Cir. 2002), *cert. denied*, 123 S.Ct. 1956 (2003). The government must show that "the defendant[s] knew of the conspiracy and . . . voluntarily became part of it." *United States* v. *Onyiego*, 286 F.3d 249, 254 (5th Cir. 2002). "Circumstantial evidence, such as a concert of action, may suffice, but each link in the inferential chain must be clearly proven." *Id.* at 255. Demonstration of the existence of an agreement is the "central element." *Bieganowksi*, 313 F.3d at 276. After that, "even minor participation in the conspiracy may serve as a basis for conviction." *Id.*

At trial, the Meis testified to the existence of the conspiracy, and Moncrief does not dispute that the conspiracy existed. Rather, Moncrief disputes whether the evidence demonstrated that he agreed to participate in the conspiracy.

Bank fraud is the knowing execution or attempted execution of a scheme or artifice to defraud a financial institution or to obtain any property owned by or under the custody or control of a financial institution by means of false or fraudulent pretenses, representations, or promises. *See United States* v. *McCauley*, 253 F.3d 815, 819 (5th Cir. 2001). Here, the evidence shows that Moncrief knew of the

Meis' conspiracy to commit bank fraud and that he voluntarily joined it.

Moncrief joined the Meis' conspiracy to commit bank fraud when the Meis told Moncrief their formula. The evidence shows that after he learned of the formula, Moncrief always referred properties that "worked" under the formula. When Moncrief performed appraisals in relation to one of the Meis' straw buyer transactions, these appraisals consistently contained the same types of false information. The discrepancies between the truth and the information contained in Moncrief's appraisal reports are simply too uniform to be explained away as merely a "sloppy" and "unprofessional" job, as Moncrief argues. This is demonstrated by the following:

- In the straw buyer transactions, Moncrief's appraisals all exceeded the value of the property listed on the MLS by between $100,000 and $200,000.
- Although Moncrief certified that he examined the MLS in preparing the appraisals, he uniformly omitted any mention of the MLS price in his appraisals, and he never disclosed any of the current published purchase prices for the properties, including the prices for which the Meis were contracting to purchase the properties.
- On each appraisal, Moncrief indicated that one of the Mei realty companies held title to the property, when in reality the Meis did not own the property at the time of the appraisal. In dozens of these cases, Moncrief was the realtor who arranged for the sale from the property's real owner to the Meis.
- Moncrief often listed the properties as vacant, even though they were occupied. In one instance, Moncrief listed the property as vacant even though

the photograph of the property that he included in the appraisal showed the property's occupants.

- Moncrief never indicated on the appraisal that, as was often the case, he would receive a $3,000 finder's fee if the loan was approved and the sale of the property closed. From June 1998 until January 2000, Moncrief received $174,470 in finder's fees. Had lenders known that Moncrief was not disinterested in the approval of the loan, they would not have relied upon his appraisal.
- Moncrief always avoided including realtor yard signs in his photographs of the properties that he included in the appraisals. Frank Mei, Jr., testified that in some cases Moncrief removed the yard signs from the yards when the pictures were taken.
- In purchasing 8402 Braesdale, Moncrief signed and submitted a loan application falsely indicating that Hathaway Properties owned the property, falsely reporting that he was purchasing the property for $210,000, and falsely reporting he had $70,000 in his bank account. When this loan application was submitted, Moncrief was aware that 8402 Braesdale actually was owned by Camel Lee Girgis, that Girgis was selling his property for $147,500, and that Moncrief had approximately $700 in his savings account.
- As a result of the misrepresentations contained in Moncrief's loan application, he purchased 8402 Braesdale without having to make a down payment because the entire purchase amount was provided by the mortgage loan.

Against this evidence indicating that Moncrief knowingly and intentionally participated in the conspiracy to defraud lenders, Moncrief can point only to his denials to show that he did not intend to misrepresent any fact and that he was

unaware of any misrepresentations. The jury's guilty verdicts compel this court to conclude that the jury did not credit Moncrief's claims that he was ignorant of the falsity of the representations contained in documents he signed, and that the jury did not believe Moncrief's testimony that he did not intentionally engage in conduct that helped conceal his misrepresentations, such as removing realty signs and omitting MLS data from his appraisals. Viewing these credibility determinations, as we must, in the light most favorable to the guilty verdict, we conclude that a rational trier of fact could have found Moncrief guilty beyond a reasonable doubt for conspiring to commit bank fraud.

Additionally, "[f]raudulent intent may be found from circumstantial evidence that one party arranged matters with another party in such a way as would facilitate the commission of fraud, especially where the evidence further shows that the first party gained money or advantage at the expense of the second." *United States* v. *Dadi*, 235 F.3d 945, 950 (5th Cir. 2000). Here, Moncrief performed his appraisals completely outside of the conventions of his profession in a way that facilitated the commission of the fraud, for which Moncrief received $3,000 payments on referrals and $300 payments for appraisals. The jury reasonably could have found fraudulent intent on this evidence.

The evidence adduced at trial clearly supports Moncrief's conviction for conspiring to commit bank fraud. Accordingly, we affirm the conviction of Moncrief for conspiring to commit bank fraud based on sufficiency of the evidence under either the miscarriage of justice standard or under the more lenient *Glasser* standard.[10]

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[10] Moncrief argues that the court should make a negative inference due to the Government's failure to call Kevin Mei as a witness. However, the court may draw a negative inference only when the

B. *Sufficiency of the Evidence as to Other Charges—Vicarious Liability*

As to the counts of money laundering and illegal monetary transactions in criminally derived property, the evidence is undisputed that members of the conspiracy other than Moncrief committed these offenses. But, it is well-settled that a conspirator may be held criminally culpable for the substantive offenses committed in the course of the conspiracy of which he is a member, while he is a member, even if committed by other members of the conspiracy. *See United States* v. *Basey*, 816 F.2d 980, 997 (5th Cir. 1987); *Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946). The evidence is sufficient to support the jury's verdict finding that Moncrief was a member of the conspiracy at all times relevant to the indictment. Thus, under conventional rules of vicarious liability, the jury

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missing witness has information "peculiarly within his knowledge." *United States* v. *Wilson*, 322 F.3d 353, 363 (5th Cir. 2003) (quoting *Streber* v. *Comm'r of Internal Revenue*, 138 F.3d 216, 221-22 (5th Cir. 1998)). Here, Moncrief has failed to show that Kevin Mei possessed information peculiarly within his knowledge. Moncrief argues that only Kevin Mei could testify that he and Moncrief did not have an express agreement to collaborate in the conspiracy. However, Frank Mei, Jr., Frank Mei, Sr., and Daniel Mei all testified to the effect that Moncrief never made an express agreement to participate in the conspiracy. Instead, Moncrief learned of the Meis' formula and invited himself into the conspiracy. Accordingly, Moncrief has failed to show that Kevin Mei has unique testimony entitling Moncrief to a favorable inference. Moncrief also would not be entitled to the negative inference if Kevin Mei was mutually available to both sides as a witness. We need not address that issue.

verdict finding Moncrief guilty of all substantive offenses in the indictment was supported by the evidence.[11]

C. *Ineffective Assistance of Counsel*

Moncrief's sole claim of ineffective assistance is based upon his attorney's failure to move for acquittal at the close of the defense's case. We have already reviewed the sufficiency of the evidence as to the conspiracy charge under both the miscarriage of justice and *Glasser* standards. Because a motion for acquittal appropriately would have been denied had it been made, Moncrief has failed to show that he was prejudiced by his attorney's allegedly deficient conduct. *See Rosalez-Orozco*, 8 F.3d at 199 (defining prejudice as showing within a reasonable probability that the result of the proceedings would have been different absent the attorney's errors). Accordingly, we reject Moncrief's claim of ineffective assistance of counsel.

D. *The Deliberate Ignorance Instruction*

Moncrief argues that the district court erred by including an instruction on deliberate ignorance in the jury charge.[12] As both parties acknowledge, Moncrief's challenge on this ground is reviewed under the standard set out in *United States* v. *Mendoza-Medina*, 346 F.3d 121, 132 (5th Cir. 2003). In that case, the court explained that "[t]he standard of review of a defendant's claim that a jury

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[11] Because we affirm Moncrief's vicarious liability under the conspiracy theory, we do not need to address the issue of Moncrief's vicarious liability for aiding and abetting.

[12] The district court gave the jury the following instruction:

> You may find that a Defendant had knowledge of a fact if you find that the Defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the Defendant cannot be established merely by demonstrating that the Defendant was negligent, careless or foolish, knowledge can be inferred if the Defendant deliberately blinded himself to the existence of a fact.

instruction was inappropriate is whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs the jurors as to the principles of law applicable to the factual issues confronting them." *Id.* "All reasonable inferences [are] drawn from the evidence in the light most favorable to the Government." *Id.*

1. ***Moncrief's Challenge to the Factual Predicate for this Instruction***

A deliberate ignorance instruction is appropriate only where "the defendant claims a lack of guilty knowledge and the proof at trial supports the reasonable inference of deliberate ignorance." *United States* v. *Soto-Silva*, 129 F.3d 340, 345 (5th Cir. 1997). There is no question here that Moncrief has claimed a lack of guilty knowledge throughout. A reasonable inference of deliberate ignorance can be made upon a showing of "(1) the subjective awareness of a high probability of the existence of illegal conduct and (2) purposeful contrivance to avoid learning of the illegal conduct." *United States* v. *Saucedo-Muñoz*, 307 F.3d 344, 348 (5th Cir. 2002), *cert. denied*, 537 U.S. 1178 (2003). Moncrief argues that the evidence fails to show either prerequisite for drawing a reasonable inference of deliberate ignorance.

The deliberate ignorance instruction was given as part of the court's charge on the offense of illegal monetary transaction in criminally derived property. *See* 18 U.S.C. § 1957(a). In the context of that offense, the defendant must possess knowledge that the money used in a transaction was derived from a specific unlawful activity. *See Dadi*, 235 F.3d at 950. The jury was instructed that in this case the unlawful activity was bank fraud. Thus, the first issue is whether the evidence supports a finding that Moncrief was aware of the high probability that the Meis were making transactions in funds derived from bank

fraud.[13] We already have concluded that the evidence was sufficient to convict Moncrief of conspiring to commit bank fraud. Accordingly, it is clear that the evidence sufficiently supported the conclusion that Moncrief was aware of a high probability that bank fraud was occurring.

Purposeful contrivance can be met by a showing that the defendant failed to investigate in the presence of highly suspicious behavior. *See United States* v. *Lara-Velasquez*, 919 F.2d 946, 953 (5th Cir. 1990) (failure to inspect a truck when his uncle, who had a poor reputation, loaned the defendant a truck with a distinctive paint job with instructions to drive in a circuitous route); *United States* v. *Scott*, 159 F.3d 916, 923 (5th Cir. 1998) (failure to verify the existence of treasury notes that the defendants leased to others for use as collateral to secure large loans).

Here, Moncrief failed to investigate in the presence of highly suspicious circumstances. Not only were the Meis hiring Moncrief to perform highly inflated appraisals in cases where the Meis were buying the properties for substantially less than the appraisal value, but Moncrief was aware that the FBI and HUD were investigating these highly irregular transactions. This evidence called on Moncrief to perform some investigation, yet the evidence is clear that he did nothing. In fact, Moncrief claims that his attention was diverted to such an extent that he failed even to read the sale and closing documents involved with the purchase of his own home. This is sufficient to support a

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[13] The government does not allege that Moncrief directly committed the illegal monetary transactions. Rather, the government's theory was that Moncrief aided and abetted the Meis in their commission of the monetary transactions alleged in the indictment, specifically, those involving 7515 Creekwood, 10314 Burgoyne, 8127 Northbridge, and 1406 East Brooklake Drive. To aid and abet "simply means to assist the perpetrator of a crime while sharing the requisite criminal intent." *See United States* v. *Ismoila*, 100 F.3d 380, 387 (5th Cir. 1996).

finding of purposefully contrivance to avoid guilty knowledge. Accordingly, the district court had an adequate factual predicate to instruct the jury on deliberate ignorance with respect to the offense of illegal money transactions.

2. *Moncrief's Challenge to the Instruction Based on Specific Intent*

In his second argument as to the deliberate ignorance instruction, Moncrief argues that the instruction should not be given in conjunction with specific intent crimes such as bank fraud and money laundering. Because Moncrief failed to preserve this argument,[14] the standard of review on this claim is plain error. Under plain error review, this court can reverse the district court only upon finding that: (1) there was an error; (2) the error was clear and obvious; and (3) the error affected the defendant's substantial rights. *See United States* v. *Gracia-Cantu*, 302 F.3d 308, 310 (5th Cir. 2002). Once a plain error has been shown, this court retains discretion over whether to correct the error and will do so only upon finding that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 736 (1993).

Moncrief bases his argument primarily on *United States* v. *Chen*, 913 F.2d 183, 190 (5th Cir. 1990), a case in which this court approved granting of a deliberate ignorance instruction as to one count of the indictment but reversed because a deliberate ignorance instruction was given as to the offense of maintaining a place for the purpose of distributing a controlled substance. The offense in that case required a specific intent—namely, the intent to maintain a place for the purpose of distributing a controlled substance.

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[14] While Moncrief objected to the deliberate ignorance instruction, he did so solely on the basis that the government did not provide a sufficient factual predicate to warrant the instruction. Thus, Moncrief failed to preserve his right to appeal on this second basis.

Id. at 190. Here, the deliberate ignorance instruction was given as part of the court's instruction to the jury as to the offense of illegal monetary transactions in criminally derived property. This offense only requires knowledge, not specific intent.[15] *See Dadi*, 235 F.3d at 950. The holding of *Chen* therefore is inapposite. At the most, *Chen* suggests that a deliberate ignorance instruction may be inappropriate for certain offenses requiring specific intent. *See id.* Moreover, subsequent cases have demonstrated a reluctance to expand *Chen* to other specific intent offenses. Relevant here, the Fifth Circuit has approved the deliberate ignorance instruction in cases involving the following offenses: bank fraud, *see Scott*, 159 F.3d at 924; conspiracy, *see Soto-Silva*, 129 F.3d at 345; and money laundering, *see United States* v. *Fuller*, 974 F.2d 1474, 1482 (5th Cir. 1992). All of these cases require specific intent. Accordingly, we find no plain error in the district court's deliberate ignorance instruction.

III. *Moncrief's Challenge to the Sentence*

A. *Incorrect Application of the 2000 Edition of the Guidelines*

Citing *ex post facto* concerns, the Presentence Report ("PSR") applied the 2000 Sentencing Guidelines rather than the 2001 Guidelines. Under the 2000 edition's section for grouping offenses, Moncrief's offense level was determined under section 2S1.1. *See* U.S.S.G. § 3D1.2 (Nov. 1, 2000). Concluding that Moncrief had laundered $24,330,339, section 2S1.1 produced an offense level of 33. The PSR

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[15] To convict for monetary transactions involving property derived from specified unlawful activity under 18 U.S.C. § 1957(a), the government must prove that (1) the defendant knowingly engaged or attempted to engage in a monetary transaction (2) in criminally derived property that is of a value greater than $10,000 and (3) is derived from specified unlawful activity. *See Dadi*, 235 F.3d at 950. Specific intent is not required.

recommended the application of an enhancement under section 3B1.3 because Moncrief used a special skill to commit the offense. It also recommended an enhancement for obstruction of justice. The district adopted the PSR, admitted it into the record, and accepted all of the PSR's recommendations. It denied Moncrief's request for a downward departure. This left Moncrief with a total offense level of 37 and a sentencing range of 210-267 months' imprisonment. The district court imposed a 210-month sentence. The statutory maximum that Moncrief could have received was 240 months (twenty years), the maximum penalty that can be given for the offense of money laundering. *See* 18 U.S.C. § 1956(a)(1).

Moncrief argues that the district court erred by applying section 2S1.1 of the 2000 edition of the Sentencing Guidelines, and not the 2001 edition. Between 2000 and 2001, section 2S1.1 was almost completely rewritten. We will review this claim for plain error because Moncrief failed to object to the application of the 2000 edition of the Sentencing Guidelines before the district court.[16] When reviewing the alleged errors in the application of the Sentencing Guidelines for plain error, the defendant must show a clear and obvious error, and he must show that the error affected his substantial rights by establishing that the

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[16] Moncrief argues that he should be deemed to have preserved his appeal on this issue because he cited to the 2001 edition of the Sentencing Guidelines in his objection to the PSR. The only reference to the 2001 edition of the Guidelines in Moncrief's objection to the PSR is as follows: "According to the USSG § 2B1.1 cmt. n.2(b) (Nov. 1, 2001), gain is to be used as an alternative measure of loss if there is a loss but it reasonably cannot be determined." Even under the most generous reading, this bare citation to the 2001 edition of the Guidelines cannot be construed to have placed before the district court the argument that the PSR erred by applying the 2000 edition of the Guidelines, rather than the 2001 edition. The argument therefore was forfeited.

sentence would have been different but for the alleged error. *See United States* v. *Calverley*, 37 F.3d 160, 165 (5th Cir. 1994) (en banc).

Here, the district court's error is clear and obvious. The court used the 2000 edition of the Guidelines and should have used the 2001 edition of the Sentencing Guidelines.[17] However, Moncrief cannot show prejudice. As discussed above, under the 2000 edition of the Guidelines, Moncrief accumulated an offense level of 37, which produced a sentencing range of 210 to 262 months. By comparison and as outlined below, under the 2001 edition of the Guidelines Moncrief would receive an offense level of 36, which would produce a sentencing range of 188 to 235.

To evaluate whether the district court's mistaken use of the 2000 Guidelines prejudiced Moncrief, we must determine what Moncrief's sentence would have been under the 2001 Guidelines. It is undisputed that the analysis begins with section 2S1.1. The 2000 version of 2S1.1 had a base of 23 and then added points based upon the amount of money that was laundered. By contrast, the 2001 version calculates the base offense level with reference to whatever offense was involved in generating the money that was

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[17] Under section 1B1.11 of the Sentencing Guidelines, the sentencing court is to use the Guidelines edition in effect on the date of the sentencing unless such use would violate the *ex post facto* clause of the United States Constitution. If so, then the court must use the edition of the Guidelines in effect on the date that the offense of conviction was committed. *See* U.S.S.G. § 1B1.11(b)(1) (Nov. 1, 2001). Because sentencing took place while the 2001 edition of the Guidelines was in effect and the offenses of conviction contained in the indictment were committed while the 1998 edition of the Guidelines was in effect, these are the only two editions that the district court properly could have used. Since there were no valid *ex post facto* issues, the 2001 edition of the Guidelines should have been used. The version of section 2S1.1 in the 1998 Guidelines is identical to the version in the 2000 Guidelines, though both differ substantially from the 2001 version.

laundered. Moncrief agrees that because the proper underlying offense is bank fraud, the correct base offense level under the 2001 Guidelines is determined under section 2B1.1. Section 2B1.1(a) establishes a base offense level of 6. *See* U.S.S.G. § 2B1.1(a) (Nov. 1, 2001). Under 2B1.1(b)(1), the offense level must be increased according to the value of the loss caused by the bank fraud. *See* U.S.S.G. § 2B1.1(b)(1) (Nov. 1, 2001).

The PSR, which the district court adopted, calculated the loss at $7,385,740. Moncrief now challenges the court's finding of a $7.3 million loss. Moncrief argues that the amount should be reduced due to several factors, *viz.*: (1) due to payments that the Meis made on the mortgages, (2) the fact that the Meis resold some of the properties thereby repaying those loans, and (3) because, pursuant to Application Note 2(E)(ii), the district court should have considered the value of collateral at the time of sentencing, and not at the time that the fraud was committed.

Moncrief's first two arguments must be rejected. The Commentary following section 2B1.1 provides:

> The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference .... The estimate of the loss shall be based upon available information, taking into account, [such factors] as appropriate and practicable under the circumstances ....

U.S.S.G. § 2B1.1, cmt. n.2(c) (Nov. 1, 2001).

Moncrief has failed to show that the district court's estimate of the loss was unreasonable. While he points to factors such as payments made to the lenders and the resale of some of the properties, Moncrief fails to show that such data actually was, or is, available, or that it can be

practicably obtained and factored into the court's estimate. Thus, Moncrief has failed to show that the district court committed plain error.[18]

Moncrief's third challenge to the district court's loss finding is based on Application Note 2(E)(ii) of section 2B1.1. Application Note 2(E)(ii) provides:

> *Credits Against Loss.* — Loss shall be reduced by the following: . . . (ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from the disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

U.S.S.G. § 2B1.1, cmt. n.2(E)(ii) (Nov. 1, 2001). Contrary to this Application Note, the PSR used the value of the collateral at the time the bank fraud occurred, not at the time of sentencing. Moncrief argues that if the PSR had used the value of the collateral at the time of sentencing rather than at the time of the fraud, the PSR would have arrived at a reduced loss calculation.

This argument fails for two reasons. Moncrief failed to raise any argument based upon Application Note 2(E)(ii) in his original brief, so the Court need not address it. *See Hadnot* v. *Bay*, 344 F.3d 474, 476 n.4 (5th Cir. 2003) (court does not need to consider an argument first raised in the appellant's reply brief). Furthermore, we note that even if

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[18] Although Moncrief made the first two arguments in the court below, he did not relate this error to using the 2000 Guidelines rather than the 2001 Guidelines. Consequently he did not preserve this issue for appeal. Even if Moncrief had objected and preserved this point, a district court's calculation of loss attributable to a defendant's scheme to commit fraud is a factual finding that this court reviews for clear error. *See United States* v. *Sidhu*, 130 F.3d 644, 654 (5th Cir. 1997). Moncrief has shown neither plain nor clear error.

we addressed this issue, to succeed under the plain error standard, Moncrief would need to show that the failure to follow Application Note 2(E)(ii) would result in a reduction of his sentence. Moncrief has not met this burden because there is no evidence in the record to show that the loss would amount to less than $7 million if the value of the collateral had been established at the time of sentencing rather than the time the crimes were committed. On plain error review, Moncrief cannot prevail under Application Note 2(E)(ii) without such evidence. *See Calverley*, 37 F.3d at 165.[19]

In light of the foregoing, we hold that the PSR's estimate of loss should be accepted. Applying the PSR's finding that Moncrief's fraud caused a loss of $7.3 million, the Guidelines require the court to add 20 points to Moncrief's base offense level. *See* U.S.S.G. § 2B1.1(b)(1)(K) (Nov. 1, 2001).

Under section 2B1.1(b)(2)(A), two more points must be added because the PSR clearly shows the involvement of more than ten victims.[20] Under section 2B1.1(b)(8), two more points must be added because the offense involved sophisticated means, which the application notes define as "especially complex or intricate offense conduct" including "the use of fictitious entities [and] corporate shells . . . ." U.S.S.G. § 2B1.1, cmt. n.6(B) (Nov. 1, 2001). The government argues that a four-point enhancement applies under subsection (b)(12), but Moncrief is correct that no evidence in the record demonstrates that the safety or soundness of any financial institution was jeopardized by Moncrief's bank fraud, so these four points should not be

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[19] This argument was not made in the court below nor in Moncrief's original brief. It appears for the first time in Moncrief's Reply Brief.

[20] Appended to the PSR was a list of ninety-five transactions involving dozens of defrauded lenders to whom Moncrief submitted a fraudulent appraisal.

added. This produces a base offense level of 30 under section 2B1.1.

Moncrief agrees that two more points must be added under section 2S1.1(b)(2)(B) because Moncrief was convicted under 18 U.S.C. § 1956. Both parties also agree that subsection (b)(3) of section 2S1.1 does not apply. Application Note 5(B) specifically instructs that subsection (b)(3) does not apply when, as is the case here, "the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is the only conduct that forms the basis for application of subsection (b)(3) . . . ." U.S.S.G. § 2S1.1, cmt. n.5(B) (Nov. 1, 2001). Both parties agree that a two-level enhancement under section 3B1.1 applies. Adding these two points to the points accumulated under sections 2S1.1 and 2B1.1 produces an offense level subtotal of 34.

B. *Obstruction of Justice*

We turn now to the last issue for consideration in determining whether the district court plainly erred by applying the 2000 Guidelines. The district court imposed a two-level enhancement under section 3C1.1 for obstruction of justice. The district court based the enhancement on the combination of two acts which the court found were committed by Moncrief,[21] perjury and obstruction of justice. The primary basis for the enhancement was perjury. The district court found that Moncrief perjured himself in the following testimony:

> Q: Mr. Moncrief, did you ever make any representation or omit information in these appraisal

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[21] Moncrief disputes whether, in applying the enhancement, the court relied upon Moncrief's apparent attempt to bribe Special Agent Kepler with an inflated appraisal. The record clearly indicates that the district court relied on both the false testimony and the attempted bribe.

reports with the intention to deceive or cheat or defraud a lender?

A: No.

The second basis was for attempted bribery. In May 1999, Special Agent Kepler served a subpoena for documents on Moncrief. Along with his response to the subpoena, Moncrief submitted an appraisal of Kepler's house. The appraisal valued Kepler's home at $280,000. Eighteen months earlier, Kepler had purchased the home for $140,000. On the appraisal, someone, presumably Moncrief, had written the sum $280,000 followed by a question mark.

In *United States* v. *Dunningan*, 507 U.S. 87, 94-95 (1993), the Supreme Court held that prior to imposing a sentencing enhancement for obstruction of justice due to perjury, a sentencing court must make independent factual findings that the testimony was intentionally false, material, and was not due to confusion, mistake, or faulty memory. The district court here cited portions of Moncrief's testimony and made specific findings that the testimony was false, that it was material, that Moncrief gave the testimony with the willful intent to provide false testimony, and that the false testimony was not due to mistake, confusion, or faulty memory. The district court ruled that these findings provided a sufficient basis to conclude that Moncrief gave this testimony with a willful intent to obstruct the administration of justice and imposed the enhancement. Moncrief now argues that the court clearly erred because there was no evidence that Moncrief possessed the intention to deceive lenders.

The district court did not clearly err. In the first place, by convicting Moncrief of bank fraud, the jury necessarily found that Moncrief did make false representations with the intent to deceive lenders. We already have ruled that the evidence clearly supported this conclusion. Secondly, the

district court relied upon Moncrief's attempted bribe as evidence that Moncrief's fraudulent actions were deliberate. Moncrief provided no innocent explanation for how the inflated appraisals of Kepler's house was included with the materials submitted in compliance with the subpoena. Why would Moncrief go to the trouble to make an appraisal of Kepler's house? And why would Moncrief give the inflated appraisal to Kepler but to try to influence him? The trial evidence as to perjury along with the attempted bribe provides ample evidence to sustain the district court's finding that Moncrief obstructed justice.

Adding the final two points for obstruction of justice produces, under the 2001 Guidelines, a total offense level of 36.[22] With an offense level of 36 and criminal history of I, Moncrief's sentencing range would be 188 to 235 months. By comparison, under the 2000 Guidelines, the district court sentenced Moncrief to 210 months, which is within the range produced under the 2001 Guidelines. Moncrief therefore has failed to establish that he necessarily was prejudiced by the district court's mistaken application of

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[22] The arithmetic involved in arriving at this offense level is as follows:

2B1(a)		6	(base offense level)
2B1.1(b)(1)(K)	add	20	(due to a loss of $7.3 million)
2B1.7(b)(8)	add	2	(because sophisticated means were used)
2B1.7(b)(2)(B)	add	2	(because there were more than ten victims)
2S1.1	add	2	(for a conviction under 19 U.S.C. § 1956)
3B1.1	add	2	(because a special skill was involved)
3C1.1	add	2	(obstruction of justice)
Total offense level:		36	

the 2000 Guidelines rather than the 2001 Guidelines. Accordingly, Moncrief has failed to show that his sentence was plainly erroneous.[23] *See United States* v. *Leonard*, 157 F.3d 343, 346 (5th Cir. 1998) (where an error in the application of the Sentencing Guidelines is shown but on remand the district court could impose the same sentence, the court will uphold the sentence despite the trial court's error).

IV. *Downward Departure*

This court has jurisdiction to review a district court's denial of a motion for a downward departure only if the district court denied the motion based upon an error of law. *See United States* v. *Buck*, 324 F.3d 786, 797 (5th Cir. 2003). Under this principle, this court possesses jurisdiction to review the denial if the denial was premised on the district court's mistaken understanding that the Guidelines do not permit a departure. *Id.* However, jurisdiction is lacking where the district court's refusal to grant the departure is based upon a conclusion that the departure is not warranted by the facts of the case. *Id.*

Here, the district court expressly acknowledged its authority to depart. The district court explained that it declined to do so based upon the court's conclusion that there was no principled basis on which to depart. Based upon these statements, we hold that the district court did

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[23] Prior to argument, counsel for Moncrief submitted a 28(j) letter directing the court's attention to the Supreme Court's opinion in *Blakely* v. *Washington*, 124 S.Ct. 2531 (2004), in which the Supreme Court found that certain enhancements that were added to a defendant's sentence under the State of Washington's sentencing guidelines violated the defendant's constitutional right to a jury trial. Without deciding whether Moncrief's filing of the 28(j) letter preserves the issue, we note under *United States* v. *Pineiro*, 377 F.3d 464 (5th Cir. 2004), this court has ruled that *Blakely* does not apply to the Federal Sentencing Guidelines. *Blakely* therefore is inapplicable to the instant case.

not misunderstand its authority to depart. The record is clear that the district court would not depart downward even if we remanded the case for resentencing. Accordingly, this court lacks jurisdiction to review the district court's denial of Moncrief's motion for a downward departure. *See Buck*, 324 F.3d at 797.

V. *Cumulative Error*

The only error that Moncrief has established was the district court's mistaken application of the 2000 edition of the Sentencing Guidelines, rather than the 2001 Guidelines. However, Moncrief has failed to show that the error harmed him, and he has failed to establish other errors with which that error could be combined to produce a cumulative prejudicial impact that would justify a new trial. Thus, Moncrief's argument that the district court's cumulative errors denied him of his right to due process must be denied.

VI. *Conclusion*

For the foregoing reasons, we affirm the judgment of conviction and sentence.

AFFIRMED

UNITED STATES DISTRICT COURT

Southern District of Texas

Holding Session in Houston

UNITED STATES OF AMERICA

v.

JOE BOB MONCRIEF

AMENDED JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

United States Courts
Southern District of Texas
ENTERED
NOV 15 2002
Michael N. Milby, Clerk of Court

Case Number: 4:00CR00544-006

Patrick Ruzzo
Defendant's Attorney

☐ See Additional Aliases sheet.

Date of Original Judgment: August 23, 2002
(or Date of Last Amended Judgment)

Reason for Amendment

☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c)).

☒ Correction for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1-3, and 6-20 on August 29, 2001 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371 and 18 U.S.C. § 1956(h)	Conspiracy to violate the laws of the United States and to commit bank fraud, money laundering promotion and to engage in monetary transactions over $10,000	08/21/2000	1
18 U.S.C. § 1344	Bank fraud	04/27/1999	2

☒ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 4 and 5 ☐ is ☐ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 451-74-2037

Defendant's Date of Birth: 03/24/1946

Defendant's USM No.: 88756-079

Defendant's Residence Address:
8402 Braesdale Lane
Houston, Texas 77071

Defendant's Mailing Address:
8402 Braesdale Lane
Houston, Texas 77071

November 8, 2002
Date of Imposition of Judgment

Signature of Judicial Officer

LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

Nov. 14, 2002
Date

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APPENDIX B

DEFENDANT: **JOE BOB MONCRIEF**
CASE NUMBER: **4:00CR00544-006**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1344	Brank fraud	05/18/1999	3
18 U.S.C. § 1957	Monetary transactions with criminally derived property	03/03/1999	6
18 U.S.C. § 1957	Monetary transactions with criminally derived property	04/28/1999	7
18 U.S.C. § 1957	Monetary transactions with criminally derived property	05/13/1999	8
18 U.S.C. § 1957	Monetary transactions with criminally derived property	05/18/1999	9
18 U.S.C. § 1957	Monetary transactions with criminally derived property	06/03/1999	10
18 U.S.C. § 1956	Money laundering	03/03/1999	11-12
18 U.S.C. § 1956	Money laundering	04/28/1999	13-14
18 U.S.C. § 1956	Money laundering	05/13/1999	15-16
18 U.S.C. § 1956	Money laundering	5/18/1999	17-18
18 U.S.C. § 1956	Money laundering	06/03/1999	19-20

DEFENDANT: JOE BOB MONCRIEF
CASE NUMBER: 4:00CR00544-006

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 210 months.

This term consists of SIXTY (60) MONTHS as to Count 1, TWO HUNDRED AND TEN (210) MONTHS as to Counts 2 and 3 and 11-20; ONE HUNDRED AND TWENTY (120) MONTHS as to Counts 6-10; all such terms to run concurrently for a total term of TWO HUNDRED AND TEN (210) MONTHS.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court strongly recommends the defendant be expeditiously designated to the Forth Worth Medical facility. The Court further recommends the defendant be separated from co-defendants, Kevin Mei, Frank-Domenic Mei, Daniel Mei and Frank Mei, Sr.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ on _____
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 pm on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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DEFENDANT: **JOE BOB MONCRIEF**
CASE NUMBER: **4:00CR00544-006**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

This term consists of THREE (3) YEARS as to Counts 1 and 6-20; and FIVE (5) YEARS as to Counts 2 and 3, all such terms to run concurrently, for a total term of supervision of FIVE (5) YEARS.

☐ See Additional Supervised Released Terms Sheet.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

☐ See Additional Mandatory Conditions Sheet

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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DEFENDANT: **JOE BOB MONCRIEF**
CASE NUMBER: **4:00CR00544-006**

SPECIAL CONDITIONS OF SUPERVISION

The defendant is required to provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer, unless the defendant is in compliance with the fine or restitution payment schedule.

The defendant is required to participate in a mental health program as deemed necessary and approved by the probation officer. The defendant will incur costs associated with such a program, based on ability to pay as determined by the probation officer.

The defendant shall not hold a position of employment in a fiduciary role.

DEFENDANT: **JOE BOB MONCRIEF**
CASE NUMBER: **4:00CR00544-006**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 1,800.00	$	$

A $100 special assessment is ordered as to each of Counts 1-3, 6-20.

☐ See Additional Terms for Criminal Monetary Penalties Sheet.

☒ The determination of restitution is deferred until 11-21-2002. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

☐ See Additional Restitution Payees Sheet.

TOTALS	$0.00	$0.00

☐ If applicable, restitution amount ordered pursuant to plea agreement $_____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: **JOE BOB MONCRIEF**
CASE NUMBER: **4:00CR00544-006**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $ 1800.00 due immediately, balance due
- ☐ not later than _____, and/or
- ☒ in accordance with ☐C, ☐ D, and/or ☒ E, below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☒ Special instructions regarding the payment of criminal monetary penalties:
Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number (Including Defendant Number)	Defendant Name	Joint and Several Amount

☐ See Additional Defendants Held Joint and Several sheet.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property Sheet.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

V.

JOE BOB MONCRIEF

CR-H-00-544
Houston, Texas

August 23, 2002
8:57 a.m.

SENTENCING

BEFORE THE HONORABLE LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

* * * * *

[3] THE COURT: The first objection that you have raised is as to the loss amount, the relevant conduct determination, and the application of 2S1.1BK of the guidelines. Do you want to add to what you've already stated?

* * * * *

[4] THE COURT: The addendum to the PSR accurately notes that under 3D1.3, the related counts must be grouped to come to one offense level, and the money laundering as the most serious of the counts drives the result. The money laundering guideline calculation is properly applied. The

argument that you are making is similar to that noted in a fairly recent Fifth Circuit case that is cited at 226, F3d, 346, in which the defendant argued that the District Court erred in sentencing him under the money laundering guidelines rather than the fraud guidelines, which is essentially you're argument.

In that case, as in this case, the defendant had been convicted of money laundering, wire fraud, transportation of securities for fraudulent purposes. Well, in this case similarly there are convictions for fraud and for money laundering. Those are—those in the case that I'm citing were grouped and assigned a single offense level which was derived from the most serious of the counts in the group which the grouping rules under 3D1.3A led to the use of the money laundering guideline applicable to the offenses exactly as occurred here. It is a very straightforward application of the guideline grouping, and there is no error either in the law that is applied or the facts upon which the law is based, upon—to which the law is applied.

[5] Your argument, I think, is not so much that the guidelines were improperly applied, but rather that Mr. Moncrief's case falls outside the heartland of money laundering cases covered by Section 2S1.D. Your argument as it was in the Davis case that I'm citing, which is why I found it so helpful as an analytical framework, is not that the guidelines are improperly applied, but rather that your case presents a basis for departing from the guideline application.

I overrule your objection insofar as it is a challenge to the guideline application. I will consider the basis on which the application is asserted as a—as an argument in support of a downward departure and will examine it under that ruling. I'm not ruling, I'm just putting it in the proper analytic framework.

The fraud conduct that you have spent much of your objection asserting as the true braces of the fraud amount—of the loss amount is simply not the right guideline under which the loss is to be calculated. And as stated, I find that the guideline calculation is properly done. Your objection on that basis is overruled.

* * * * *

[23] THE COURT: You have moved for downward departure under 5K2.0. You—your argument is—has several aspects to it. One is that the—well, I'm going to put them under three categories: One is that the application of the money laundering guideline overstates the seriousness of Mr. Moncrief's criminal conduct, it overstates his involvement in the money laundering scheme, it overstates his role in causing the losses, and it overstates his culpability, if you will, that is the intent to defraud. Your argument is even that if he—I'll let you state your own argument, but I think I've characterized the first ground.

Second ground is disparity that Mr. Moncrief, as a result of the application of the money laundering counts of conviction, stands exposed to a considerably more severe sentence than those who are clearly the most culpable in this scheme.

And, third, the medical concerns that Mr. Moncrief has that are certainly documented. Are there any other grounds for departure that I have omitted?

MR. RUZZO: No, Your Honor.

THE COURT: All right. I'll let you address those before we get to departure; however, let me state that I adopt the PSR, having overruled the objections, and direct that it be made part of this record.

[24] The total offense level is a 37 and the criminal history category is one. The guideline range is 210 to 266 months, there is a fine range, but there is a restitution obligation that will also be imposed and in light of the

restitution obligation that will be required, I am not going to impose a fine on top of restitution. I find no ability to pay both.

I will also say that there is—that as to the restitution, I don't know if the parties are prepared to address that issue today, but I am not, particularly because this is an unusual case with respect to restitution, the gap between the amount that Mr. Moncrief himself pocketed as a result of his involvement and the amount that he is held accountable for, even on a joint end, that others have been held accountable for, even on a joint and several basis, is large, it was large for many of the straw borrowers, as well, and I am mindful of that. But as with—whenever that is present, it is an issue to be considered, and I need to consider it as part of the analysis of the restitution obligation. So that's a very long winded way of saying I'm not going to rule on restitution today. There is a special assessment as well of $1800. I have received a number of letters written on behalf of Mr. Moncrief from family and friends, and I have read those as well, and those are also made part [25] of this record.

In connection with the downward departure motion and the termination of the appropriate sentence, I invite Mr. Ruzzo and, of course, Mr. Moncrief, to make any statement they wish on Mr. Moncrief's behalf. I know the government wants to be heard on the downward departure motion as well.

* * * * *

MS. HARMON: For the record, the Court made PSR as part of the record and that would include addendum and I believe that was just a single addendum; is that right?

THE COURT: Yes, of course.

* * * * *

[44] THE COURT: With respect to the motion for downward departure, I have looked long and hard at this. I

have the authority, this is not a case in which the Court has no authority, but the law is very clear as to the limits of that authority. I considered most strongly whether the application of the money laundering guidelines sentencing guideline overstated Mr. Moncrief's role, his intent, and examined the case law and this record to determine if I could, by analogy, depart downward two levels on the theory that he had a minor role in the money laundering aspects of the conspiracy as compared to the only other individuals who were engaged in the money laundering aspects of the Meis. And I looked very hard at the guidelines, at the cases under the guidelines, whether [45] they were other cases that gave minor role adjustments for different levels of engagement in money laundering activity specifically, and came up with the conclusion, which has been affirmed by Ms. Harmon's presentation, that there is no principal basis for doing it in this case. The Meis got an aggravating role adjustment that recognizes, as the guidelines require, the difference in their relative culpability on the money laundering aspects of the scheme. Mr. Moncrief is getting no such adjustment.

The guidelines teach that, and the cases teach that a minor participation adjustment cannot be granted when a defendant's participation is somewhat less than other participants, particularly when those other participants get an aggravating role adjustment. The defendant's participation must be enough less so that he at best was peripheral to the advancement of the elicit activity. Citing 43, F3d, 148 at 152, which in turn cites a string of Fifth Circuit cases that have been reviewed by the Supreme Court.

Mr. Moncrief was not the Meis, Mr. Moncrief did not invent this scheme, Mr. Moncrief was not the one that kept it going, Mr. Moncrief did not device it. And, yes, Mr. Moncrief, I do believe that had this—had you never met the Meis you probably would not be in the inside of a courtroom

today. And I have read the record of [46] your life and you have much to be proud of, which makes this all the more heart-breaking. But given the record that is before me, given the constraints that the guidelines and the case law developed under the guidelines imposed, there is just no way that I can on the principle basis, depart downward on the basis of improper or on the basis that this case is outside of the heartland because it overstates what you did, the harm that you did, the intent with which you did.

In the case that I cited, the Court goes on to say, with respect to a different kind of money laundering scheme, but a money laundering scheme, "A role as go-between does not warrant a finding of minor participation. The defendant's actions, as the person who in that case brought the buyers and sellers together for the transactions, was critical to the offense." Similarly, Mr. Moncrief, without the appraisals that met the formula over and over and over again, without your role, the scheme could not have kept going. Your actions were critical to the offense, and to find you a minor participant, given your critical role in this scheme, is simply not justified given the criteria to be applied.

Disparity by itself, Ms. Harmon has pointed out the cases that limit the ability of the Court to depart downward on that basis. Having—and, again, [47] I've looked at this very carefully. I put this sentencing off until all the others had taken place so that I could have full information as to where you would stand. Where you stand is different from the others, and it is improper to examine where you are in relation to others, particularly the Meis, without examining the sentencing adjustments that they received. Each of them got a three level adjustment for acceptance of responsibility resulting from the combination of their pleas of guilty and subsequent conduct. You did not get that. That is what we call a warranted disparity. Each of them cooperated substantially, and the government recognized that cooperation in moving for a downward departure. I did

not grant the downward departure to the extent the government asked me to, but to the extent they did get some benefit from their cooperation. That is also a warranted difference between where they stand and where you stand.

They pleaded guilty to counts that did not expose them to as much time as you are exposed to. That is part of what the government's discretion permits them to do, it is part of the benefit they obtained by pleading guilty, and it is to that extent a warranted disparity. All of these adjustments, when you calculate—if you were to take away from what you're getting, the differences that are accounted for by their decisions to plead guilty, their [48] cooperation with the government, then the disparity is largely warranted and it is not a basis for a downward departure.

Third and finally the issue of your health. You have an admirable history of overcoming the adversity that your health issues have presented you for years, and the letters of support that you have received from family and friends speaks over and over again of the respect people have for you, for what you have accomplished, despite the problems of pain and impairments that your health issues have presented, and I share in that respect. Mr. Ruzzo argues that you are at such an increased risk because of those health issues that it is beyond the capability of the prison system to respond. I think he's wrong. The federal prison system is quite well equipped to handle patients who present serious health problems and chronic health problems. There are, I believe, three prison—federal prison system facilities that are specifically designed for inmates who have chronic health issues. One is in Forth Worth, one is in Springfield, Illinois, and I believe there's one in Butner.

PROBATION OFFICER: Minnesota.

THE COURT: Minnesota. There are three of them, and they have for years demonstrated their competence at handling inmates who are sentenced to long terms with [49] chronic problems. And I have again read the case law. The health issues that you raise tend to come up when courts—for example, if you were looking at a 12-month sentence I might have the ability to say, "Do it in home detention." I don't have the ability to say, "Don't go to prison for a sentence of the extent that you face." I know very well what a sentence of this length means, and I know you and your family do too.

It is the judgment of this Court, based on all the information before me, that there is no basis for downward departure under the guidelines and I must deny that motion.

* * * * *

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-21017

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JOE BOB MONCRIEF
Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Opinion 11/1/04, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE and PICKERING*, Circuit Judges, and LYNN**, District Judge.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

REHG-6a

APPENDIX E

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. Title 18 of the United States Code provides in relevant part:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

* * * * *

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity;

* * * * *

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

* * * * *

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

* * * * *

3. The 2000 United States Sentencing Guidelines Manual provides, in relevant part:

§2S1.1. Laundering of Monetary Instruments

(a) Base Offense Level:

(1) 23, If convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A);

* * * * *

(b) Specific Offense Characteristics

* * * * *

(2) If the value of the funds exceeded $100,000, increase the offense level as follows:

Value (Apply the Greatest)	Increase in Level
* * * * *	
(K) More than $20,000,000	add 10
* * * * *	

§3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

Commentary

Application Notes:

* * * * *

3. "Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.

* * * * *

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

* * * * *

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When the counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

* * * * *

§§2S1.1, 2S1.2, 2S1.3;

* * * * *

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to §3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply (e.g., theft and fraud), apply the offense guideline that produces the highest offense level.

* * * * *

4. The 2001 United States Sentencing Guidelines Manual provides in relevant part:

§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b)(1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

* * * * *

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
* * * * *	
J) More than $2,500,000	add 18
K) More than $7,000,000	add 20
* * * * *	

(2) Apply the greater) If the offense—

(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or

* * * * *

(8) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

* * * * *

Commentary

* * * * *

Application Notes:

* * * * *

2. *Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).*

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

* * * * *

(C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is

entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

* * * * *

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

* * * * *

(E) Credits Against Loss.—Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of

sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

* * * * *

3. Victim and Mass-Marketing Enhancement Under Subsection (b)(2).—

(A) Definitions.—For purposes of subsection (b)(2):

* * * * *

(ii) "Victim" means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

* * * * *

6. Sophisticated Means Enhancement under Subsection (b)(8).—

* * * * *

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(8)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under subsection (b)(8) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

* * * * *

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

* * * * *

(b) Specific Offense Characteristics

* * * * *

(2) (Apply the Greatest):

* * * * *

(B) If the defendant was convicted under 18 U.S.C. § 1956, increase by 2 levels.

* * * * *

(3) If (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering, increase by 2 levels.

Commentary

Application Notes:

* * * * *

2. *Application of Subsection (a)(1).—*

(A) Multiple Underlying offenses.—In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to §1B1.5 (Interpretation of References to Other Offense Guidelines).

(B) Defendants Accountable for Underlying Offense.—In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under §1B1.3(a)(1)(A). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

* * * * *

5. *(A) Sophisticated Laundering under Subsection (b)(3).—For purposes of subsection (b)(3), "sophisticated laundering" means complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1956 offense.*

Sophisticated laundering typically involves the use of—

(i) fictitious entities;

(ii) shell corporations;

(iii) two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, involving criminally derived

funds that were intended to appear legitimate; or

(iv) offshore financial accounts.

* * * * *

6. *Grouping of Multiple Counts.—In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts).*

* * * * *

§3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

Commentary

* * * * *

3. *"Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.*

* * * * *

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

* * * * *

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.4, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

* * * * *

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to §3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.

* * * * *

§6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

Commentary

* * * * *

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information.

* * * * *

No. 04-1316

In the Supreme Court of the United States

JOE BOB MONCRIEF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 04-1316

JOE BOB MONCRIEF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the

judgment of the court of appeals, and remand the case for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

PAUL D. CLEMENT
Acting Solicitor General

APRIL 2005

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* The government waives any further response to the petition unless the Court requests otherwise.

(3)

No. 04-1316

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOE BOB MONCRIEF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

No. 04-1316

JOE BOB MONCRIEF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

This case presents two questions. The first is "[w]hether petitioner's sentence, imposed under the United States Sentencing Guidelines, is inconsistent with * * * *United States* v. *Booker*, 125 S. Ct. 738 (2005)." Pet. i. The second is "[w]hether the court of appeals erred in holding * * * that a defendant can never establish prejudice from an erroneous application of the Sentencing Guidelines * * * unless the defendant's actual sentence exceeded the permissible maximum under a correct application of the Guidelines." *Ibid.* The United States has filed a memorandum addressing the first question, agreeing with petitioner's suggestion (Pet. 15-16) that "the appropriate

disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand for further consideration in light of *Booker* and *Fanfan*." U.S. Mem. 1-2.

The United States' memorandum, however, does not address the second question presented, which is whether the Fifth Circuit adopted an incorrect test for establishing prejudice. In this case, the Fifth Circuit held that petitioner could not have been prejudiced by the district court's application of the wrong Guidelines edition—even though the correct version would have yielded a lower offense level—because petitioner's 210-month sentence fell within both sentencing ranges. That holding conflicts with the decisions of numerous courts of appeals, which have rejected the Fifth Circuit's test. See Pet. 17-18. That issue has continued importance both to petitioner and the courts because, under *Booker*, the Guidelines exert considerable influence on sentencing determinations. See *id.* at 18-19. As explained below, a recent ruling by the United States Court of Appeals for the First Circuit—decided after the instant petition for a writ of certiorari was filed—underscores the importance of correcting the Fifth Circuit's prejudice analysis.

I. The Conflict Among The Courts Of Appeals Regarding The Prejudice Standard Has Broadened Following *Booker*

In *United States* v. *Cruzado-Laureano*, No. 02-2658, 2005 WL 762119 (1st Cir. April 5, 2005), the First Circuit confronted a case legally indistinguishable from this one. In that case, as in this one, defendant was erroneously sentenced under the money laundering provisions of the 2000 Guidelines, rather than a subsequent edition. In that case, as in this one, the mistake was significant. As the court of appeals below and the First Circuit in *Cruzado-Laureano* recognized, "between the 2000 and 2002 editions, the sentencing commission introduced a major change in the

way that sentences for money laundering are calculated." *Id.* at *17; Pet. App. 25a ("Between 2000 and 2001, section 2S1.1 was almost completely rewritten."). In particular, the 2000 Guidelines provide "a fixed number as the base offense level for money laundering," whereas the 2001 Guidelines and later editions "take a more complicated approach by incorporating the offense level of the underlying offense." *Cruzado-Laureano*, 2005 WL 762119 at *17.

In light of those differences, the First Circuit concluded that sentencing under the post-2000 money laundering Guidelines would require resolution of several legal and factual issues related to the defendant's underlying offenses that otherwise would not have been considered by the district court. *Cruzado-Laureano*, 2005 WL 762119 at *17. Because of that, the First Circuit declined to conduct its own assessment of what sentence the defendant might have received under the correct Guidelines edition, and instead remanded the case to the district court:

> Sentencing under the [2002, rather than the 2000, guidelines] might involve factual disputes or legal issues which the district court has not yet had an opportunity to address. If we were to explore this uncharted territory ourselves, we, in effect, would be doing the sentencing rather than the district court. This is not an appropriate allocation of functions.

Id. at *17 (citations omitted).

The First Circuit also explained that, in light of *Booker*, it would be particularly inappropriate for the court of appeals to speculate as to the sentence the district court would have imposed. *Booker* rendered the Guidelines "advisory rather than mandatory," which "injects even more uncertainty into an attempt by [the court of appeals] to reconstruct a sentencing decision by the district court under the [correct] guidelines." *Cruzado-Laureano*, 2005 WL 7621119 at *17. Faced with such unknowns—both as to

how the district court would have applied the correct Guidelines in the first instance and as to whether it would have exercised its post-*Booker* discretion—the First Circuit "conclude[d] that the most prudent course is to vacate the sentence and remand for resentencing under the correct edition of the guidelines." *Ibid.*

In the present case, the Fifth Circuit did exactly the opposite. It declined to remand to the district court for consideration of the 2001 Guidelines in the first instance, instead attempting to determine what petitioner's sentence *could have* been under the 2001 Guidelines so as to evaluate prejudice. Pet. App. 26a. In so doing, the court of appeals found that the amount of loss was over $7 million; that there were more than 10 victims; and that petitioner employed sophisticated means in furtherance of the offense. *Id.* at 29a. The court of appeals then concluded that, under the 2001 Guidelines, petitioner's offense level would have been 36 and his sentencing range would have been 188 to 235 months. *Id.* at 27a-33a. That resulted in a lower offense level and sentencing range than that calculated under the 2000 Guidelines (37 and 210-262 months, respectively). *Id.* at 32a-33a. Nonetheless—and even though the district court had sentenced petitioner to the lowest possible sentence and had characterized that sentence as "heart-breaking"—the court of appeals found no prejudice because the district court would not "necessarily" have imposed a lower sentence. *Id.* at 32a. The Fifth Circuit's approach is thus directly at odds with the First Circuit's decision in *Cruzado-Laureano*.

II. This Court Should Grant The Petition, Vacate The Court Of Appeals' Judgment, And Remand The Case For Further Consideration As To Whether The Prejudice Inquiry Is Consistent With *Booker*

Although the court of appeals' approach to the prejudice inquiry had been rejected by numerous other courts of ap-

peals prior to *Booker*, see Pet. 17-18, the proper course is to afford the Fifth Circuit an opportunity to reconsider its position. As the First Circuit explained, *Booker* now makes it particularly difficult for a court of appeals to determine with any precision what the district court would have done had it applied the correct Guidelines. Indeed, the fact that the district court is no longer bound by the Guidelines introduces a substantial new variable. Accordingly, in addition to vacating and remanding for reconsideration in light of *Booker*, the Court should remand this case to the Fifth Circuit for further consideration in light of the First Circuit's very different post-*Booker* prejudice analysis in *Cruzado-Laureano*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the Fifth Circuit for further consideration in light of this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005). Alternatively, this Court should grant the petition to review the Fifth Circuit's prejudice standard.

Respectfully submitted,

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